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JUN 21 1982
ALEXANDER L. STEVAS,
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81-2326

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOVEREIGN NEWS COMPANY,

Petitioner,

—v—

JOHN T. CORRIGAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Are Ohio's criminal obscenity statutes, Ohio Revised Code §§ 2907.01 and 2907.32, as construed by the Ohio Supreme Court, unconstitutional under the First and Fourteenth Amendments due to overbreadth or vagueness?

PARTIES

John T. Corrigan, Prosecuting Attorney for Cuyahoga County, Ohio and the following members of the Cleveland, Ohio Police Department are respondents in this Court and were parties in the United States Court of Appeals for the Sixth Circuit, whose judgment is sought to be reviewed: Roy Warner, L. Thompson, John Crawford, Archie Catavalos, Kenneth White, William Poe, Richard B. Millett, John H. Devine, James Lynsky, Vincent G. Krawulski, Carl Delau, Andrew S. Vanyo, James Kennelley, Robert J. Cermak, Henry Yisha, Gregory Kunz, B. Jones, Richard McIntosh, John McNamara, Edward C. Lucas, Samuel Hennie, Charles Berkey, Robert O'Brien, Officer Kaminsky, Officer Banyon and Officer McGreer. In addition, William J. Brown, Attorney General of Ohio appeared as amicus curiae in the court below. Lee C. Falke, Prosecuting Attorney for Montgomery County, Ohio and Dayton, Ohio police officers E. R. Robinson and C.L. Dalrymple were parties defendant in the district court but were not parties to the appeal in the court below which resulted in the judgment now sought to be reviewed.

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SOVEREIGN NEWS COMPANY,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Sovereign News Company, petitioner, prays that a writ of certiorari issue to review the judgment entered in this action by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The second opinion of the United States Court of Appeals for the Sixth Circuit in this case, reported at 674 F. 2d 484 (6th Cir. 1982) is set forth in the Appendix at pp. A1-A5. The second opinion of the district court in this case, unreported, is set forth in the Appendix at pp. A6-A90. The first opinion of the United States Court of Appeals for the Sixth Circuit in this case, reported at 610 F. 2d 428 (6th Cir. 1979), is set forth in the Appendix at pp. A93-A96. The first opinion of the district court in this case is reported at 448 F. Supp. 306 (N.D. Ohio

1977). The opinion and judgment of the Sixth Circuit in *Turoso, et al. v. Cleveland Municipal Court, et al.*, reported at 674 F. 2d 486 (6th Cir. 1982), entered the same day as the second opinion of the Sixth Circuit in this case and deciding the same issue in six consolidated habeas corpus cases, is set forth in the Appendix at pp. A107-A129. The six opinions of the district courts in the habeas corpus cases reviewed by the Sixth Circuit in its consolidated decision in *Turoso, et al. v. Cleveland Municipal Court, et al., supra,* five of which are unreported and one of which is reported at 531 F. Supp. 829 (N.D. Ohio 1980), are set forth in the Appendix at pp. A130-212. The opinion of the Ohio Supreme Court in *State v. Burgun,* 56 Ohio St. 2d 354 (1978), referred to in both opinions rendered by the Sixth Circuit in this case is set forth in the Appendix at pp. A213-A245.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were filed on February 4, 1982. The Court of Appeals denied the petitioner's application for rehearing on March 23, 1982. This petition seeks review of the judgment of a United States Court of Appeals in a civil case. This Court has jurisdiction to grant this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States are set forth in the Appendix at pp. A247-A250. Title 28, Section 1331 of the United States Code is set forth in the Appendix at pp. A251-A252. Title 28, Sections 1343 and 2201 of the United States Code and Title 42 Section 1983 of the United States Code, as those statutes were worded at the time of the filing of the complaint in this case, are set forth in the Appendix at pp. A253-A256. Ohio Revised Code Sections 2907.01 and 2907.32 are set forth in the Appendix at pp. A257-A265.

STATEMENT OF THE CASE

This petition seeks review of the judgment of the United States Court of Appeals for the Sixth Circuit which decided an important issue upon which there has been sharp disagreement among the various federal district and Circuit Judges who have considered it. Specifically, the court of appeals in this case determined that Ohio's criminal obscenity statutes, Ohio Revised Code §§ 2907.01 and 2907.32, are neither unconstitutionally overbroad nor vague. The court of appeals, therefore, reversed the contrary finding of the district court and vacated the judgment of the district court declaring Ohio's criminal obscenity laws unconstitutional and preliminarily enjoining the respondents from enforcing those laws against the petitioner.

The case began when Sovereign News Co., the petitioner, filed an action in the United States District Court for the Northern District of Ohio for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201, 1331 and 1343 on March 7, 1977, three weeks after some thirty law enforcement officers from two different counties in Ohio conducted a massive search of the petitioner's business premises in Cleveland, Ohio, for evidence that could be used to prosecute the petitioner under the state's criminal obscenity laws. Named as defendants were two police officers of the City of Dayton, County of Montgomery, Ohio; the Montgomery County prosecutor; twenty-six police officers of the City of Cleveland, County of Cuyahoga, Ohio; and the Cuyahoga County prosecutor.[1]

The petitioner moved for a preliminary injunction restraining the named defendants from enforcing the Ohio criminal

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1 The respondents in this Court are the Cuyahoga County law enforcement authorities who were named as defendants—the Cuyahoga County prosecutor and twenty-six Cleveland police officers. The Montgomery County law enforcement authorities who were named as defendants in the complaint are not respondents in this Court, as the petitioner's claims for declaratory and injunctive relief against them were dismissed by the district court and that action of the district court was not before the court of appeals for review when it rendered the judgment which the petitioner now asks this Court to review.

obscenity statute against it. An evidentiary hearing on that motion in the district court began on March 29, 1977 and was completed on March 31, 1977. The hearing on the motion for a preliminary injunction was consolidated with the final hearing on the petitioner's claim for a declaratory judgment finding Ohio's criminal obscenity law unconstitutional, a claim which presented solely a legal issue (App. A102-A106).

At hearing, the evidence showed that on February 16, 1977 at 10:30 a.m., approximately thirty law enforcement officers (two of whom were Dayton policemen and the rest of whom were Cleveland policemen) besieged the office and warehouse building of Sovereign News Co. in the City of Cleveland, where they spent the next four hours rummaging throughout the premises and seizing a wide variety of business records and other items (Tr. 65, 218, 60-61, 84-85).

The search was conducted pursuant to a warrant which had been issued by a judge of the Common Pleas Court of Cuyahoga County at the request of the Dayton policemen, who were investigating Sovereign's business transactions with twelve bookstores in Dayton (Tr. 180, 204-205). The warrant authorized a search of Sovereign News Co. for thirteen allegedly obscene magazines which Sovereign allegedly had supplied to the twelve Dayton bookstores as well as business records evidencing Sovereign's relationship with those Dayton bookstores. Notwithstanding the warrant's limitation, the record reveals and the district court found that the searching officers transgressed far beyond the authority contained in the writ for the specific purpose of furthering an ongoing Cleveland investigation of Sovereign, an investigation that had been undertaken with a view toward prosecuting Sovereign in Cleveland under Ohio's criminal obscenity laws. *Sovereign I, supra,* at 448 F. Supp. 321-325.

Cleveland police officers testified that at the time of the raid, Sovereign and its employees were the subject of a current and ongoing investigation by the Cleveland police; that the Cleveland police department had conducted surveillance at Sovereign's building; that Sovereign's employees had been followed; that contacts had been made with other law enforcement agencies to obtain information about Sovereign and its

employees; and that the investigation was being conducted with a view toward prosecuting Sovereign under Ohio's criminal obscenity law (Tr. 90-92, 216-217, 223-224).

An assistant county prosecutor for Montgomery County testified that his office was also conducting an investigation of Sovereign and its employees to determine whether an indictment should be returned in Montgomery County against them for pandering obscenity and engaging in organized crime (Tr. 246-247).

On May 3, 1977, nearly two months after the suit had been filed and more than one month after the conclusion of the hearing in the district court, a two-count indictment was returned by the Montgomery County Grand Jury charging Sovereign with violation of Ohio Revised Code Section 2907.32, pandering obscenity, and Ohio Revised Code Section 2923.04(A)(5), engaging in organized crime. The district court took judicial notice of the post-hearing existence of the indictment, pursuant to Federal Rules of Evidence 201 and 902(4). *Sovereign I, supra,* at 448 F. Supp. 315.

Additionally, the parties stipulated that a prosecution was pending against Sovereign in Hamilton County, Ohio, on indictments returned in 1976 for pandering obscenity and engaging in organized crime (Tr. 273-274).

But, even though prosecution of Sovereign News in Cuyahoga County, Ohio, had been threatened, no prosecution of Sovereign in that jurisdiction was pending when suit was filed, when the hearing on petitioner's motion for a preliminary injunction was concluded, or when the district court entered its original order in this case on October 31, 1977.

On the basis of the foregoing set of facts, the district court refused to hear the petitioner's claims for declaratory and injunctive relief against the Montgomery County authorities and, instead, dismissed those claims on the basis of *Younger v. Harris,* 401 U.S. 37 (1971) and its progeny. *Sovereign I, supra,* at 448 F. Supp. 328-372.

But because *no* prosecution was pending against the petitioner in Cuyahoga County, Ohio, the district court did not

abstain from deciding the claims for declaratory and injunctive relief asserted by the petitioner against the Cuyahoga County law enforcement authorities. *Sovereign I, supra,* at 448 F. Supp. 390-408. Rather, the district court reached the merits of those claims, declared Ohio's obscenity law unconstitutional and entered a preliminary injunction, but only against the Cuyahoga County prosecutor and the Cleveland police officer defendants and restraining them only from enforcing that law against the petitioner, its owners or its employees. *Sovereign I, supra,* at 448 F. Supp. 390-408.

While cross-appeals from the district court's decision were pending in the United States Court of Appeals for the Sixth Circuit,[2] the Ohio Supreme Court decided the case of *State v. Burgun,* 56 Ohio St. 2d 354 (1978) (App. A213-244). In that case, the Ohio Supreme Court upheld the constitutionality of Ohio's criminal obscenity law. Because of that intervening state court decision, the Sixth Circuit Court of Appeals, without reaching the merits of the appeals before it, issued an order on December 7, 1979 remanding the present case to the district court for further consideration in the light of the action by the Ohio Supreme Court (App. A93).

The Cleveland police officers then filed a petition with this Court for a writ of certiorari to review the decision of the Sixth Circuit Court of Appeals remanding the case to the district court. This Court denied the petition for a writ of certiorari on June 16, 1980 (App. A92).

The case was then before the district court a second time. The district court carefully reconsidered its judgment in light of the decision of the Ohio Supreme Court in *State v. Burgun, supra.* On September 19, 1980, the district court, in an extensive opinion, declared Ohio's obscenity law as construed by the Ohio Supreme Court to be unconstitutionally vague and overbroad (App. A6-A90).

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2 The Cuyahoga County officials appealed from the declaratory judgment and preliminary injunction entered against them. The petitioner appealed from the district court's order dismissing its claims for declaratory and injunctive relief against the Montgomery County officials.

From that decision, the Cleveland police officers and the Cuyahoga County prosecutor, who are respondents in this Court, appealed to the Sixth Circuit Court of Appeals.[3] On February 4, 1982, the Court of Appeals issued a *per curiam* order in which it held that Ohio's criminal obscenity law as interpreted by the Ohio Supreme Court is not unconstitutionally overbroad or vague. Circuit Judge Engel wrote a concurring opinion, in which he apologetically noted that the "majority [had] disposed of by order an issue which has generated at least three lengthy analyses by the district courts and has seen four judges of the United States District Court for the Northern District of Ohio evenly divided on the constitutionality of the Ohio statute," and in which he remarked that "[b]ecause the issue is more complex than the order would imply, I believe it is necessary to provide a more reasoned analysis, given the importance which has been attached to the issue by the Supreme Court of Ohio and by the United States district judges who have been obliged to deal with it." (App. A4).

Judge Engel was also the author of the far more extensive majority opinion in another case decided the very same day as this one adjudicating the very same issues raised about the constitutionality of Ohio's criminal obscenity law. *Frank Turoso, et al. v. The Cleveland Municipal Court, et al.*, 674 F. 2d 486 (6th Cir. 1982), petition for cert filed on June 9, 1982, Case No. 81-2266 (App. A107-A129). That decision was rendered in six consolidated appeals from conflicting decisions rendered by various federal district judges sitting in the United States District Court for the Northern District of Ohio in habeas corpus proceedings instituted by persons who had been convicted and sentenced under Ohio's obscenity statutes.

The district judges who decided those habeas cases had been divided on the question of the constitutionality of the Ohio obscenity statute. District Judge John M. Manos, who presided over the instant case, granted habeas relief in three cases pending before him for the reasons expressed in his second

3 Petitioner did not renew its appeal from the district court's order dismissing the claims against the Montgomery County officials.

opinion in the present case (App. A177-A182, A183-A188, A189-A194). District Judge Ann Aldrich also granted habeas relief in the case pending before her on the ground that the Ohio obscenity law as construed by the Ohio Supreme Court is unconstitutionally vague and overbroad (App. A209-A212). District Judge William K. Thomas and Chief Judge Frank J. Battisti upheld the constitutionality of the Ohio obscenity statute and, therefore, denied habeas relief in the cases before them (App. A130-A176, A195-A208).

Separate appeals were taken from each of those judgments, but the appeals were consolidated for decision by the Sixth Circuit Court of Appeals. Over the vigorous dissent of Circiut Judge Merritt, the majority in the consolidated habeas cases found that the constitutionality of Ohio's obscenity statute had been saved by the judicial gloss placed upon it by the Ohio Supreme Court in *State v. Burgun, supra.* A petition for a writ of certiorari to review the judgment of the Court of Appeals in that case was filed on June 9, 1982 and is presently pending before this Court in case number 81-2266.

The present petition, which raises the identical issues, seeks review of the *per curiam* order entered by the Sixth Circuit Court of Appeals in this case on the same day.

REASONS FOR GRANTING THE WRIT

AN IMPORTANT QUESTION, UPON WHICH THERE IS SHARP DISAGREEMENT AMONG THE FEDERAL DISTRICT AND CIRCUIT JUDGES WHO HAVE CONSIDERED IT, IS PRESENTED AS TO WHETHER OHIO'S CRIMINAL OBSCENITY STATUTES, AS CONSTRUED BY THE OHIO SUPREME COURT, ARE UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS DUE TO OVERBREADTH OR VAGUENESS.

There can be little doubt that the questions squarely raised by this petition for a writ of certiorari are important and substantial: whether or not Ohio makes it a crime, under its obscenity statute as construed by the Ohio Supreme Court in

State v. Burgun, 56 Ohio St. 2d 354 (1978), to publish literature which is protected by the First Amendment and whether or not Ohio has given clear and specific notice of what ideas its citizens may express without fear of criminal prosecution under that statute.

Two federal district judges and a Circuit Judge who carefully considered these issues all were left with the firm and clear conviction, persuasively expressed in written opinions, that Ohio's obscenity law as construed by the Ohio Supreme Court in *Burgun* is flagrantly unconstitutional under the First and Fourteenth Amendments due to overbreadth and vagueness. Those federal district and Circuit Judges who arrived at the contrary conclusion that Ohio's obscenity law as construed by the Ohio Supreme Court is valid, nevertheless, implicitly acknowledged that the constitutional attacks waged against the statute were by no means insubstantial.

Thus, the court below in the present case stated that it "recognizes that there is language in the Ohio Statute which is in arguable conflict with . . . *Miller v. California*" (App. A2-A3). And the majority in the habeas cases decided the same day acknowledged that the habeas petitioners' ". . . claims have superficial appeal" (App. A116); conceded that, ". . . taken alone, certain of the disjunctive definitions of 'obscene' in section 2907.01(F) may appear to apply only to protected activity, such as simply nudity and violence" (App. A119); and agreed " . . . with the dissent that the language in [another Ohio Supreme Court decision] is disturbing. . . ." (App. A124).

In this posture, with the issues so sharply debated by federal district and Circuit Judges alike, but with all of these Judges in agreement that the issues are, indeed, substantial, the question of the constitutionality of Ohio's obscenity law should be heard and settled by this Court. For it is not too much to suggest that what hangs in the balance is freedom of expression in the State of Ohio.

In order to place the issues raised by this case in their proper perspective, it is important first to review the constitutional defects of Ohio's criminal obscenity law as written and then to

consider whether the Ohio Supreme Court's decision in *Burgun* remedied those defects.

A. The Overbreadth And Vagueness Of Ohio's Criminal Obscenity Law As Written.

In its landmark decision in *Miller v. California*, 413 U.S. 15 (1973), this Court defined the limitations imposed by the First and Fourteenth Amendments upon the power of the states to proscribe obscenity. This Court held:

> [W]e confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value.
>
> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24 (footnote and citations omitted).
>
> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law as written or construed. *Id.* at 27.

On January 1, 1974, subsequent to this Court's decision in *Miller*, Ohio Revised Code §§ 2907.32 and 2907.01, the statutes

challenged here, became law. Section 2907.32 of the Ohio Revised Code makes it a crime to disseminate obscene materials while Section 2907.01 of the Ohio Revised Code defines obscenity. That statutory definition, in relevant part, is as follows:

> Definitions. As used in sections 2907.01 to 2907.37 of the Revised Code:
>
> (A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.
>
> (B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.
>
> (C) "Sexual activity" means sexual conduct or sexual contact, or both.
>
> * * * * *
>
> (F) When considered as a whole, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:
>
> (1) Its dominant appeal is to prurient interest;
>
> (2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;
>
> (3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
>
> (4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human

bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

The first occasion on which a federal court measured this definition of obscenity against the standards enunciated in *Miller* occurred in this case when the district court issued the first of two decisions declaring Ohio Revised Code §§ 2907.01 and 2907.32 unconstitutional. In the course of a scholarly and extensive opinion, District Judge John M. Manos found those statutes to be unconstitutional due to their substantial overbreadth and vagueness and upon a determination that they were not readily susceptible to an authoritative construction by the state courts that would cure their constitutional infirmities. On the question of overbreadth, the district court held in its first opinion at 448 F. Supp. 400:

The court finds that in four separate instances § 2907.01 defines "obscenity" in a manner that restricts constitutionally protected expression.

First: Section 2907.01(F)(1), (2), (3), (4) and (5) fail to incorporate the three-part *Miller* test. The *Miller* test is a conjunctive three part test, *all* parts of which must be satisfied before the material may be found obscene . . . However, under Ohio Revised Code § 2907.01 material may be found obscene without the state being required to prove each of the three parts of *Miller.* An example of this is § 2907.01(F)(1) which defines as "obscene", material whose " . . . dominant appeal is to prurient interest." Under Subsection (F)(1), the *Miller* requirements that (b) the material be "patently offensive" and (c) that "taken as a whole, it lacks serious literary, artistic, political or scientific value," need not be proven by the state before material can be found obscene. It is evident, therefore, that material which is not patently offensive, and which has, for example serious literary value, may, under Ohio Revised Code § 2907.01(F)(1), be found obscene. The Court concludes that Ohio R.C. § 2907.01 restricts material which is not "obscene", making the statute overbroad.

Second: Section 2907.01(F)(3) unconstitutionally restricts the display or depiction of extreme or bizarre violence, cruelty or brutality. It is an express holding of *Miller* that only material depicting or describing sexual conduct may be barred as being obscene. *See, Miller v. California, supra,* 413 U.S. at 24, 93 S.Ct. 2607. Therefore, the restrictions placed on the description or depiction of extreme violence unconstitutionally restrains free expression, and the statute is therefore overbroad.

Third: Section 2907.01(F)(1)(2)(3) and (5) unconstitutionally restrict the display and description of non-active sexual conduct. For example, simple nudity,

> such as the showing of a female breast or a male buttocks, may be considered obscene under § 2907.01 (F). A sexual depiction of that kind is not hard-core pornography, and cannot be restricted as being obscene . . . Therefore the court finds § 2907.01 (F)(1)(2)(3) and (5) are overbroad in that they restrict non-hardcore sexual conduct.
>
> *Fourth:* Section 2907.01(F)(1) does not define with the requisite specificity the sexual acts the description or depiction of which is restricted. Subsection (F)(1) declares that any material whose "dominant appeal is to prurient interest" is obscene. The subsection is unconstitutionally overbroad because it does not list the types of sexual conduct to be restricted, and therefore may be applied to the depiction of sexual conduct not subject to restriction. (Footnotes omitted).

In the same decision, the district court also found Ohio Revised Code Section 2907.01 to be unconstitutionally vague because of its failure to satisfy *Miller's* requirement that a state obscenity law specifically define the sexual conduct whose depiction or description is proscribed. The most glaring example of the statute's impermissible vagueness is found in subsection (1) of Ohio Revised Code § 2907.01(F). That subsection defines as obscene any material whose ". . . dominant appeal is to prurient interest." The subsection completely fails to define or list the sexual depictions included within its terms, contrary to *Miller's* express requirement.

There is little disagreement with the district court's conclusion in its first opinion in this case that, as written, Ohio Revised Code § 2907.01 is unconstitutionally overbroad and vague. Even those federal district and Circuit Judges who concluded that the statute, as interpreted by the Ohio Supreme Court, is constitutional acknowledged the unconstitutionality of that law as written (App. A2-A3, A159-A162, A200, A119).

The question upon which there has been sharp disagreement, however, is whether or not the Ohio Supreme Court saved the

constitutionality of the statute by its decision in *Burgun*. The petitioner respectfully submits that that is a question worthy of review by this Court.

B. The Overbreadth And Vagueness Of Ohio's Criminal Obscenity Law As Interpreted By The Ohio Supreme Court.

In *State v. Burgun*, 56 Ohio St. 2d 354 (1978), the Ohio Supreme Court was presented with its first challenge to the constitutionality of Ohio Revised Code § 2907.01. While it conceded that the statute's definition of obscenity as written could not survive a constitutional attack, it nevertheless determined that it could uphold the statute by merely adding to the statutory language, by judicial construction, the three-pronged *Miller* test. The court stated its holding as follows:

> We hold that R.C. 2907.01(F) is neither unconstitutionally overbroad nor void for vagueness when it is read *in pari materia* with the *Miller* decision. The *Miller* test for defining obscenity is therefore incorporated into that statute by an "authoritative" state court construction specifically sanctioned by *Miller.*
>
> *In addition, a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited.* Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted parameters, the appellants' proposition of law has no merit.
>
> *In three of the four appeals before this court the trial court adhered to the foregoing interpretation of Ohio obscenity law. In each instance the jury was instructed initially under the Ohio statute and then given a "narrowing" instruction restricting the definition of obscenity to the test laid down in Miller.* In light of that interpretation and application of R.C. 2907.01(F) this proposition of law is not well-taken and hereby overruled, except in *State v. Burgun*, case No. 77-1144, where the failure to instruct on *Miller*

was reversible error. *State v. Burgun, supra,* at 56 Ohio St. 2d 361-362 (Emphasis added).

It is apparent from its opinion and its holding that the Ohio Supreme court did not alter or tamper with the language of Ohio Revised Code § 2907.01 itself; rather, what the court did was *add* to it. District Judge Manos analyzed the effect of this judicial addition to the statutory definition of obscenity in his second opinion in this case:

> In *Burgun,* the Ohio Supreme Court left the language of Revised Code § 2907.01 intact. Instead, it attempted to remedy the statute by merely tacking onto it the three-pronged *Miller* formula, the second prong of which requires either the state legislature or the state courts to define with specificity what kinds of sexual depictions may be found obscene. The Ohio Supreme Court declined to specify what kinds of sexual depictions may be found obscene, however, and left the language of Revised Code § 2907.01 completely intact to serve that purpose. The result is that the Ohio Supreme Court created a circular definition of obscenity which always leads to and depends upon the language employed in Revised Code § 2907.01 itself.
>
> The second part of the *Miller* test of obscenity, which has been added to Revised Code § 2907.01 by the *Burgun* decision, reads as follows:
>
> > "(b) whether the work depicts or describes in a patently offensive way sexual conduct *specifically defined by the applicable state law; . . . .*" *Miller, supra,* at 413 U.S. 24 (Emphasis added).
>
> It is clear from this language that the *Miller* formula is not a self-sufficient definition of obscenity. On the contrary, *Miller's* second prong can be implemented only by legislation, or judicial interpretation of legis-

lation, which specifically prescribed what types of sexual depictions or descriptions may be obscene. When, as is true of Revised Code § 2907.01, the law as written lacks the requisite precision and censors expression which is constitutionally protected, *Miller* requires an authoritative construction which affirmatively supplies the missing specificity and which limits the law's reach to a ban on designated hard-core pornography.

In the *Burgun* decision, however, the Supreme Court of Ohio declined to list what kinds of sexual depictions may be found obscene under Revised Code § 2907.01. Instead, the court found that the statutory language alone and without judicial interpretation is narrow and specific enough to comply with *Miller's* second prong. The court expressly stated that Revised Code § 2907.01 is " . . . extremely precise in defining what conduct is prohibited." *Burgun, supra,* at 56 Ohio St. 361. Accordingly, in adding the *Miller* formula to Revised Code § 2907.01, the Supreme Court of Ohio did not alter in any fashion the law's recital of the *kinds* of descriptions or depictions which may be found obscene in Ohio. (App. A36-A38).

The court below, both in its decision in this case and in the majority opinion in the habeas cases, appeared to recognize that Ohio's obscenity law could not be saved by the mere addition of *Miller's* guidelines without a specific recitation of the kinds of sexual conduct whose depiction is to be banned under the law, as required by the second *Miller* guideline. But the court below concluded that the Ohio Supreme Court had added the requisite specificity in *Burgun* by implication. Specifically, the court below determined that the Ohio Supreme Court, in adding the three-pronged *Miller* test to the statute, had impliedly incorporated into the statute as well the examples given by this Court in *Miller* of what could be regulated

under the second prong of the *Miller* test.[4] Thus, the court concluded, the Ohio law could be upheld. Although it was not cited in the *per curiam* order entered by the court below in this case, the more extensive opinion of the majority in the habeas cases decided the same day relied upon this Court's decision in *Ward v. Illinois*, 431 U.S. 767 (1977) in support of its conclusion.

In *Ward*, this Court sustained the constitutionality of Illinois' criminal obscenity statute which, unlike Ohio's law, was phrased in simple but general language upon which it was easy to place a limiting judicial gloss that could be harmonized with the actual wording of the statute.[5] This Court upheld the Illinois statute because it had been given an authoritative construction by the state's highest court which not only incorporated into it the *Miller* guidelines, but also incorporated into it the explanatory examples given in *Miller* of the kinds of sexual depictions which can validly be regulated under the second prong of the *Miller* guidelines.

In the present case, the court below concluded that Ohio's law could also be upheld on the theory that, although it did not do so expressly, the Ohio Supreme Court in *Burgun* incorpo-

---

4 In *Miller*, this Court had stated:

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra:*

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller, supra*, 413 U.S. at 25 (footnotes omitted).

5 The Illinois statute defined obscenity as follows:

"A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."

rated *Miller's* explanatory examples into Ohio's statute by implication. In reaching this conclusion, the court ignored the overwhelming evidence to the contrary found by District Judge Manos in his second opinion in this case. At pp. 16-19 of his opinion, District Judge Manos recounted the convincing evidence showing that the Ohio Supreme Court had not adopted *Miller's* explanatory examples:

> *First,* unlike the Illinois Supreme Court, the Ohio Supreme Court has affirmed findings of obscenity in cases clearly not involving the kind of sexual depictions given as examples in *Miller. State ex rel. Keating v. Vixen,* 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973), is a particularly apt example, because that case is cited with approval by the Ohio Supreme Court in *Burgun.* The decision in *Vixen* was the second one that had been rendered by the Ohio Supreme Court in that case. The first time that court considered the case, it found that the film 'Vixen' was obscene under Revised Code § 2905.34, the predecessor to Revised Code § 2907.01, and affirmed an injunction against the film's exhibition. *State ex rel. Keating v. Vixen,* 27 Ohio St. 2d 278 (1971). That decision was appealed to the United States Supreme Court, which vacated the judgment and remanded the case for further consideration in light of *Miller* and its companion cases. *A Motion Picture Film Entitled 'Vixen' v. Ohio,* 413 U.S. 905 (1973).
>
> On remand, the Ohio Supreme Court found that definition of obscenity then in force in Ohio comported, on its face, with *Miller* and that the film 'Vixen' was, indeed, obscene. *State ex rel. Keating v. 'Vixen',* 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973).
>
> The film found by the Ohio Supreme Court to be obscene, even after *Miller* was decided and considered, was described by the Ohio Supreme Court in its earlier opinion as follows:

> "The principal character, Vixen, is a buxom young wife, whose 'square' husband is a combination pilot and fishing guide in the wilderness of British Columbia. His work keeps him away from their home for extended periods of time. Among the other characters are Vixen's motorcycle hood brother, a Canadian Mountie, with whom Vixen passes the first few minutes of the film, a vacationing couple who are guest-clients of the husband, a black American whom Vixen despises and who has fled the country to avoid the draft, and an Irish communist who attempts at gun-point to force Vixen's husband to fly him to Cuba. The first four are objects of Vixen's lechery.
>
> "The movie is approximately 70 minutes long, out of which approximately one-half deals with incest, adultery, and lesbianism, which are graphically portrayed through facial and bodily expressions indicative of orgasmic reaction. The remaining one-half of the movie leads the viewer through such contemporary issues as racism, anti-militarism, communism and airplane hijacking. ***It should be noted that, although the players are frequently shown nude and at full length, at no place are their genital parts exposed to the leering lens of the camera.***"

(Emphasis added; 272 N.E.2d at 139). The court further noted, at 272 N.E.2d 140:

> "Assume, hypothetically that the main character in 'The Sound of Music' performs during one scene, an act of sexual lewdness, could we permit that part of the

> film to go unregulated merely because the producer had an 'eye on the recent Supreme Court rulings?' The question supplies its own answer.
>
> "Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse."

(Footnotes omitted).

As described by the Ohio Supreme Court, the film "Vixen" clearly is not the kind of hardcore pornography which *Miller* permits the states to censor. Indeed, based on the description given by the Ohio Supreme Court, "Vixen" is less explicit than the film found to be protected by the First Amendment in *Jenkins v. Georgia,* 418 U.S. 161 (1974).

Similarly, the Ohio Supreme Court's suggestion that "The Sound of Music" could be rendered obscene by the inclusion of a single act of sexual lewdness in one scene completely ignores what has been basic constitutional law since the 1957 decision of the Supreme Court in *Roth v. United States,* 354 U.S. 476 (1957)—that, in judging whether a work is obscene, it must be considered as a whole and in its entirety.

Thus, unlike the decisions rendered by the Illinois Supreme Court summarized in *Ward,* the decisions of the Ohio Supreme Court have not applied the state's obscenity statute only to works which depict the kinds of hardcore sexual conduct given as examples in *Miller.* For this reason, initially, this court concludes that in *Burgun,* which cited the *Vixen* decision with approval, the Ohio Supreme Court did not intend to adopt the *Miller* examples or to narrow

the Ohio obscenity statute to the kinds of sexual depictions set forth in those examples.

Second, unlike Illinois' obscenity law, Ohio's law does not lend itself to an interpretation which incorporates *Miller*'s explanatory examples. While subsection (F)(1) of Revised Code § 2907.01, which defines as obscene any material whose "dominant appeal is to prurient interest," is open-ended, subsections (F)(2), (3), (4) and (5) are not. Those latter subsections define obscenity in detailed terms which substantially exceed and cannot be reconciled with the *Miller* examples. Revised Code § 2907.01, unlike Illinois' open-ended law, simply is not susceptible to an interpretation incorporating in it the *Miller* examples. This fact, along with the Ohio Supreme Court's statement in *Burgun* that it believes Revised Code § 2907.01 to be " . . . extremely precise in defining what conduct is prohibited," *Id.* at 56 Ohio St. 2d 361, leads to the inevitable conclusion that the court in *Burgun* did not adopt the *Miller* examples.

Third, the Ohio Supreme Court, in *Burgun,* quoted a passage from *Miller* which contained the three-pronged *Miller* test but which *excluded* the portion of the *Miller* decision which set forth examples of what a state could validly regulate under the second prong of the *Miller* test. By way of contrast, one of the Illinois Supreme Court decisions upon which the court in *Ward* relied to uphold Illinois' statute quoted the passage from *Miller* which included the explanatory examples. The court, in *Ward,* found this fact to be very significant and concluded from it that the Illinois Supreme Court had incorporated *Miller's* explanatory examples into the state's obscenity law.

Fourth, the jury instructions given in the three cases in which convictions were affirmed by the Ohio Supreme Court in *Burgun* are most revealing. The

affirmance of those convictions was expressly based upon the fact that the jury instructions given by the trial court in those cases conformed to the interpretation given to Revised Code § 2907.01 by the Ohio Supreme Court in *Burgun*. The Ohio Supreme Court specifically held that those instructions represented correct recitals of the definition of obscenity under Ohio law, *as construed in Burgun*. In each of those three cases, the trial court read Revised Code § 2907.01(F) to the jury. It then read to the jury the three-pronged *Miller* test *without any reference to Miller's explanatory examples*. Thus, in each of those three cases the trial court's instructions to the jury on the second prong of the *Miller* formula was substantially as follows:

> " . . . Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." (From p. 532 of the trial transcript in *State v. Krute*, one of the cases affirmed in *Burgun*, supra.)

Given the fact that the Ohio Supreme Court affirmed the convictions in those three cases on the express ground that the jury instructions given by the trial courts correctly stated the definition of obscenity under Revised Code § 2907.01, as construed in *Burgun*, the conclusion is inescapable that the Ohio Supreme Court did not incorporate into Ohio's obscenity law *Miller's* explanatory examples. (App. A47-A55).

In his concurring opinion in the court below, Judge Engel expressed his own uncertainty that the Ohio Supreme Court had actually adopted the *Miller* examples as part of Ohio's obscenity law. He, therefore, advanced a second, alternative basis for the conclusion that the *Burgun* decision spared Ohio Revised Code § 2907.01 from constitutional demise. And writing for the majority in the habeas cases, Judge Engel advanced

the same alternative basis for upholding the statute, perhaps betraying the uneasiness that the majority there had with the conclusion that the Ohio Supreme Court had adopted the *Miller* examples, particularly in the face of such convincing evidence to the contrary detailed in the district court's second opinion in this case.

Judge Engel, concurring in this case, and writing for the majority in the habeas cases, observed that the second guideline in *Miller* is "whether the work depicts in a patently offensive way, *sexual conduct* specifically defined by the applicable state law." *Miller, supra,* at 413 U.S. 24 (Emphasis added). He then noted that the term "sexual conduct," found in *Miller's* second prong, is also a term which is specifically defined by paragraph (A) of Ohio Revised Code § 2907.01 and that the definition given there is consistent with the *Miller* examples. Since the Ohio Supreme Court adopted the three *Miller* guidelines, including the second one which uses the term "sexual conduct," and since the term "sexual conduct" is defined by paragraph (A) of Ohio Revised Code § 2907.01, Judge Engel reasoned, the Ohio Supreme Court saved the constitutionality of the state statute by limiting the reach of the statute as a whole to only those depictions falling within the definition of "sexual conduct" set forth in paragraph (A) of R.C. § 2907.01.

The problem with this analysis is that the Ohio Supreme Court did not do, nor did it intend to do, that which Judge Engel attributed to it. Furthermore, as Judge Engel himself wrote for the majority in the habeas cases, "[i]t is unreasonable to consider only discrete sections of the statute in order to determine its validity" (App. A116-A117). Yet, petitioner respectfully submits, that is precisely what Judge Engel did by focusing so narrowly upon the definition of "sexual conduct" contained in paragraph (A) of Ohio Revised Code § 2907.01 without a proper regard to the context in which that term is defined and its relationship to the entire statutory scheme defining obscenity.

The primary source of the definition of obscenity in Ohio is paragraph (F) of R.C. § 2907.01. That section, set forth

verbatim at pp. 11-12, above, provides, in distinct subparts, five separate and disjunctive definitions of obscenity. Some of the words used in the five subparts of subsection (F) are themselves defined in other subsections of Ohio Revised Code § 2907.01. For example, nudity is defined in subsection (H), sexual excitement in subsection (G) and sexual activity in subsection (C). But these subsections are relevant to the question of obscenity *only* because the words defined by them are found in subsection (F) of the statute, where the term obscenity is itself defined. Thus, these subsections do not serve primary roles in the definition of obscenity, but rather serve subsidiary and secondary functions in that they further define terms used in the primary definition of obscenity set forth in subsection (F).[6]

The definition of sexual conduct found in subsection (A) of R.C. § 2907.01 is even one step further removed from the definition of obscenity in Ohio. That term is not even used in the definition of obscenity set forth in subsection (F) of R.C. § 2907.01. It is relevant to the definition of obscenity only because, as set forth in subsection (C) of R.C. § 2907.01, the definition of sexual activity, which *is* used in the definition of obscenity, includes but is not limited to sexual conduct.

Given this statutory structure, in which the term sexual conduct plays such a minor role, it is hard to believe that the Ohio Supreme Court in *Burgun* intended, without saying so, to turn it upside down by making the definition of sexual conduct paramount and the detailed definition of obscenity subservient. In fact, it is clear that that is not what the court did. The syllabus itself in *Burgun* expressly states that it was "R.C. § 2907.01 *(F)*" that was being "authoritatively construed to incorporate the guidelines prescribed in *Miller* . . . . " Moreover, the opinion of the Ohio Supreme Court in *Burgun* is dominated by a discussion of the definition of obscenity

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6 Some of these subsections also serve the function of defining words used in other statutes contained in Chapter 2907 of the Revised Code and which define offenses other than those involving the dissemination of obscene material.

contained in subsection (F) of R.C. § 2907.01. The definition of sexual conduct under subsection (A) of R.C. § 2907.01 is never even mentioned or cited anywhere in the court's opinion in *Burgun*.

It is clear that when the Ohio Supreme Court in *Burgun* incorporated that part of the *Miller* test which requires a work to depict " . . . sexual conduct specifically defined by the applicable state law" the court did not thereby limit or intend to limit the reach of Ohio's obscenity law to only those depictions included within the definition of sexual conduct set forth in subsection (A) of Ohio Revised Code § 2907.01. Rather, the court left subsection (F) of Ohio Revised Code § 2907.01 intact and on the books to serve as the applicable state law specifically defining the sexual conduct which may be found obscene in Ohio.

And, petitioner submits, that is precisely why the statute remains unconstitutionally overbroad and vague even after *Burgun*. The statute still censors depictions of nudity, defined so broadly as to include the showing of any portion of a female breast "below the top of the nipple" and the showing of a male or female buttock with "less than a full opaque covering." *See* Ohio Revised Code § 2907.01(H). The statute still defines as obscene the depiction of "sexual activity" which, as defined includes "sexual contact," which in turn includes a depiction of a man touching a woman's thigh. *See* Ohio Revised Code §§ 2907.01(B) and (C). The statute still outlaws depictions of extreme or bizarre violence, cruelty and brutality. Ohio Revised Code §§ 2907.01(F)(3) and (5). And the statute still censors expression whose "dominant appeal is to prurient interest," without specifying the kinds of sexual conduct the description or depiction of which is prohibited by that phraseology. As Judge Merrit stated in his dissenting opinion in the habeas cases:

> . . . all the Supreme Court of Ohio has done is simply add the *Miller* standards as a new, alternative method of sending people to prison while leaving in effect alongside it the old unconstitutional method

> outlawing graphic expression of "sexual excitement", "nudity", "bizarre violence" and "human bodily functions." (App. A128).

Both the *per curiam* decision rendered by the court below in this case and the decision rendered by the majority in the habeas cases on the same day proceed upon an erroneous premise. Because the Ohio Supreme Court held in *Burgun* that Ohio Revised Code § 2907.01 must be read in *pari materia* with *Miller*, the court below assumed that, without striking down or excising any of its language, the statute *can* be read in *pari materia* with *Miller*. But the Ohio Supreme Court never offered any guidance as to precisely how that could be accomplished. That court never explained how to get the square peg of Ohio Revised Code § 2907.01 to fit into the round hole of *Miller*, without cutting off its four corners. That court simply announced that it would fit. But the laws of physics are not amenable to change by judicial decree.

The court below itself admitted that ". . . there is language in the Ohio Statute which is in arguable conflict with . . . *Miller*" (App. A2-A3). It is respectfully submitted that the conflict between the statute and *Miller* is not merely arguable but is actually irreconcilable. So long as there remains, as part of the statute, language which defines as obscene the depiction of semi-nudity, violence, the mere touching of another's thigh and the like, it will be impossible to read the statute *in pari materia* with *Miller*.

The two decisions rendered by the court below in this case and in the habeas cases, while upholding one state's criminal obscenity law, will have a far-reaching effect on the law of obscenity throughout the nation. For the court below has expanded *Ward* in a way never intended by this Court. It has taken a statute whose actual language is at war with *Miller* and upheld it, not, as *Ward* permits, *because* the state's highest court had by judicial construction affirmatively removed or limited those actual words of the statute which render it facially overbroad and vague, but rather, *despite* the refusal of the state's highest court to do so. In the name of *Ward*, it has taken a statute whose language directly conflicts with *Miller*

and, in sustaining it, has required nothing more than the bare assertion by the state's highest court that the statutory language can peacefully co-exist side by side with the *Miller* test without any reconciliation of the conflicts between the two.

These important decisions by a federal court of appeals has breathed new life into the very kinds of broadbased statutes outlawing speech *Miller* was fashioned to eradicate and *Ward* did not intend to revive. It represents an open invitation to state legislatures to enact criminal obscenity laws which broadly stifle protected expression and holds out the promise to them that these laws will withstand constitutional attack so long as the *Miller* guidelines are inserted as a footnote to the statutory language by judicial construction.

In short, the decision below makes hollow this Court's promise in *Miller* that:

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. *Id.* at 413 U.S. 27.

As Judge Merritt stated so cogently in his dissenting opinion in the habeas cases:

> . . . this is a statute outlawing speech and artistic expression; it requires a more sensitive reading of the First Amendment than our Court has given. Unlike the relatively healthy state statute saved in *Ward v. Illinois* by insertion of a *Miller* pacemaker, the heart of the Ohio statute in question here is malignant. A *Miller* pacemaker will not regulate it. If our Court's opinion stands as the law of obscenity, then all state obscenity statutes will be upheld as valid, no matter how broadly or specifically they censor protected speech, so long as the *Miller* standards are repeated to the jurors after they are instructed to apply the unconstitutional statute. (App. A125).

This Court should grant the petition for a writ of certiorari to consider the important issues presented by this case.

CONCLUSION

For the reasons stated, the petitioner respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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FILED
JUN 21 1982
ALEXANDER L. STEVAS,
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81 -2326

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOVEREIGN NEWS COMPANY,

Petitioner,

—v—

JOHN T. CORRIGAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SECOND OPINION AND JUDGMENT OF
THE SIXTH CIRCUIT

No. 80-3694

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SOVEREIGN NEWS CO.,
Plaintiff-Appellee,

v.

LEE C. FALKE, ET AL.,
Defendants,

ROY WARNER, ET AL.,
Defendants-Appellants.

ORDER

Decided and Filed February 4, 1982.

Before: EDWARDS, Chief Circuit Judge, ENGEL, Circuit Judge, and PHILLIPS, Senior Circuit Judge.

Order of the Court filed February 4, 1982 with concurring opinion (pp. 4-5) by ENGEL, Circuit Judge.

On receipt and consideration of a second appeal in the above-styled case in which this court, on December 7, 1979, entered a per curiam opinion, pointing out:

> These consolidated appeals are from the decision of the district court reported at 448 F.Supp. 306, rendered October 31, 1977, holding parts of the Ohio obscenity statute, R.C. Ohio §§ 2907.01(F) and 2907.32, to be unconstitutionally overbroad and vague under *Miller* v. *California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).
>
> On December 7, 1978, the Supreme Court of Ohio rendered an opinion in *State of Ohio* v. *Burgun*, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978), holding that the Ohio

statute when construed to incorporate the guidelines of *Miller* v. *California*, is valid and constitutional. The first syllabus, prepared by the Supreme Court of Ohio, is as follows:

> R.C. 2907.01(F), which sets forth the definition of "obscenity," is neither unconstitutionally overbroad nor void for vagueness when it is authoritatively construed to incorporate the guidelines prescribed in *Miller* v. *California*, 413 U.S. 15, [93 S.Ct. 2607, 37 L.Ed.2d 419].

56 Ohio St.2d at 354, 384 N.E.2d at 255.

Upon consideration of the briefs, oral arguments of counsel and the entire record, it is ORDERED that these cases be remanded to the district court for further consideration in the light of the decision of the Supreme Court of Ohio in *State of Ohio* v. *Burgun*.

Sovereign News Co. v. *Corrigan*, 610 F.2d 428, 428 (6th Cir. 1979), *cert. denied*, 447 U.S. 923 (1980).

And on consideration of the briefs, record and the opinion of the District Court filed after further consideration on remand, *Sovereign News Co.* v. *Falke*, No. C77-230 (N.D. Ohio Sept. 19, 1980); and

Believing that the District Judge has too narrowly construed the opinion of the Ohio Supreme Court in *State of Ohio* v. *Burgun, supra*, and that in fact, said opinion should be construed as incorporating the guidelines of *Miller* v. *California, supra*, including such interpretative language and examples as may be found in the majority opinion in the *Miller* case.

Now, therefore, the judgment of the District Court granting plaintiff Sovereign's claims for declaratory and injunctive relief is hereby vacated and the case is remanded to the District Court for such other proceedings as may be required.

In so doing, this court recognizes that there is language in

the Ohio statute which is in arguable conflict with the United States Supreme Court's opinion in *Miller* v. *California*. In the event of prosecutions under the Ohio statute, based on state statutory provisions in conflict with the interpretation of federal constitutional law contained in *Miller* v. *California, supra*, the standards spelled out by the United States Supreme Court in its interpretation of the First Amendment will, of course, apply, as we believe the Ohio Supreme Court has clearly recognized.

Entered by order of the Court

/s/ JOHN P. HEHMAN
Clerk

ENGEL, Circuit Judge, concurring. The majority has today disposed of by order an issue which has generated at least three lengthy analyses by the district courts and has seen four judges of the United States District Court for the Northern District of Ohio evenly divided on the constitutionality of the Ohio statute. Because I believe that the purport of the order is to hold that the Ohio obscenity statute is not unconstitutional, at least in the context of the claim of Sovereign for declaratory and injunctive relief, I concur. Because the issue is more complex than the order would imply, I believe it is necessary to provide a more reasoned analysis, given the importance which has been attached to the issue by the Supreme Court of Ohio and by the United States district judges who have been obliged to deal with it. I agree that the Ohio Supreme Court has clearly endeavored to incorporate the three guidelines of *Miller* v. *California*, 413 U.S. 15 (1973), as shown by the first syllabus to *State of Ohio* v. *Burgun*, 56 Ohio St.2d 354 (1978). I am not, however, so certain that the Ohio Supreme Court in *Burgun* has in fact adopted the two examples of conduct which were described as what a State statute could define for regulation under Part B of the *Miller* standard. The syllabus does not refer to them, and the Supreme Court's decision in *Burgun* appears to affirm convictions where the instructions to the juries did not incorporate them. Instead, the instructions included only the definitions of obscene material as contained in Ohio Rev. Code § 2907.01 (F), followed by a reading, usually literal, of the three guidelines of *Miller*.

In my opinion, therefore, the Ohio statute is not vague when read with the guidelines of *Miller*. Part B of the *Miller* standards requires that the work depict or describe "in a patently offensive way, *sexual conduct* specifically defined by the applicable state law." (Emphasis added).

A plain reading of the Ohio obscenity statute shows that sexual conduct is, in fact, "specifically defined" in Ohio Revised Code § 2907.01(A):

> "Sexual conduct" means vaginal intercourse between a male and female, anal intercourse, felatio and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

When this is read in connection with section 2907.01(F), which defines "obscene," we have a coherent and sufficiently clear definition of obscene sexual conduct, which provides adequate notice and is neither overbroad nor vague. This being the case, the ruling of the majority that the statute is constitutional is all that is required here. This is because there have been no prosecutions; all that is argued here is that plaintiffs are entitled to injunctive and declaratory relief on the basis that the act is void on its face.

As the majority indicates, difficulties may arise in the course of actual prosecutions under the statute. These problems are discussed in cases decided by another panel of this court today. *See Frank Turoso, et al.* v. *The Cleveland Municipal Court, et al.*, Nos. 80-3696, 80-3728, 80-3742, 80-3743, 80-3817, 81-3127 (6th Cir. Feb. 4, 1982).

Accordingly, I concur in reversal of the judgment of the district court and remand for further proceedings. I concur in remand for further proceedings not to place in issue once more the constitutionality of the statute, but for determination of whether there are other claims which remain alive, particularly those with respect to complaints going to allegations that the rights of the plaintiffs under the Fourth Amendment were violated in other respects by the nature and scope of the seizures which apparently took place, and of which they complain in their 42 U.S.C. § 1983 action. Those issues, if still viable, were not raised before us and there appeared at oral argument to be some difference of opinion among counsel whether they still remained alive. The district court on remand can determine that issue.

SECOND OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SOVEREIGN NEWS COMPANY,	)	CASE NO. C77-230
	)	
	)	JUDGE JOHN M.
Plaintiff,	)	MANOS
	)	
v.	)	MEMORANDUM OF
	)	OPINION
LEE C. FALKE,	)	[Entered September
et al.,	)	19, 1980]
	)	
Defendants.	)	

This court decided this matter for the first time on October 31, 1977. Sovereign News Co. v. Falke, 448 F.Supp. 306 (N.D. Ohio 1977). The procedural history, id. at pp. 316-328, and legal opinion, id. at pp. 329-408, are set out in detail in that opinion and will not be restated here. Suffice to say that this court found, inter alia, that substantial portions of the Ohio obscenity statute, Ohio Revised Code §§2907.01(F) and 2907.32 were constitutionally infirm

for overbreadth and vagueness. Id. at pp. 390 et seq. Many of the parties appealed this court's decision. While the matter was pending on appeal, the Ohio Supreme Court, in contradistinction from the view expressed by this Court, found the very same statute to be constitutionally unassailable. State v. Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978).

Thereafter, the United States Court of Appeals for the Sixth Circuit remanded the matter to this court for further consideration in the light of that intervening state court decision. Sovereign News Co. v. Corrigan, 610 F.2d 428 (6th Cir. 1979). Certiorari to the United States Supreme Court was sought and denied. The matter is, therefore, for the second time, before this court for disposition.

After a careful examination of the Burgun decision, this court remains

unpersuaded that the Ohio Supreme Court, either in its holding, or its reasoning, has ameliorated, in any respect, the constitutional defects in the statute, previously identified in this court's earlier opinion. Indeed, the confusion created by that opinion, when engrafted upon the statute as an authoritative interpretation of the State of Ohio's highest tribunal, expands the defects in the statute to such an extent that this court, in fulfilling its obligation to protect the Federal Constitution, is compelled to strike down this law because of, rather than despite, the interpretation of Ohio's court of last resort. The reasons for this court's decision follow.

The litmus test for determining the constitutionality of any state law which makes criminal the distribution

of "obscene" materials appears in the Supreme Court's decision in Miller v. California, 431 U.S. 15 (1973).

> "[W]e confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary artistic, political or scientific value."
>
> "The basic guidelines for the trier of fact must be: (a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id., at 24 (footnote and citations omitted).

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law as written or construed." Id., at 27.

The Miller decision mandates that a state obscenity law be limited in its scope to hardcore sexual conduct. Miller requires that the hardcore sexual conduct be defined by the law with specificity. And Miller demands that the reach of a state law banning sexually explicit materials be limited to those works which appeal to the prurient interest, are patently offensive and lack serious literary, artistic, political or scientific value.

It was against these standards that this court measured the definition of obscenity in force in Ohio in its initial decision in this case. Sovereign News

Company v. Falke, 448 F.Supp. 306 (N.D. Ohio 1977). This court concluded then that, as enacted by the legislature, Revised Code §§2907.01 and 2907.32, were substantially overbroad in four separate respects and were impermissibly vague, in violation of the First and Fourteenth Amendments. But prior to taking the serious step of declaring these statutes unconstitutional, this court thoroughly re-examined them to determine their susceptibility to an authoritative construction by the state courts that would repair their constitutional defects. It was only after this court determined that no reasonable judicial interpretation of Revised Code §§2907.01 and 2907.32 could cure their constitutional infirmities that this court declared them unconstitutional.

On December 7, 1978, a little over a year after this court's initial decision

in this case, the Supreme Court of Ohio handed down its decision in State v. Burgun, 56 Ohio St.2d 354 (1978), reh. denied, Jan. 17, 1979. In that case, the Ohio Supreme Court decided four consolidated appeals involving convictions under the same obscenity statute which this court had found to be unconstitutional. The Ohio Supreme Court rejected arguments made by the appellants in those cases that Revised Code §§2907.01 and 2907.32 are unconstitutional under the First and Fourteenth Amendments due to overbreadth and vagueness. That court determined that the constitutional attacks on Ohio's definition of obscenity could be brushed aside by construing the statutory definition in such a manner as to incorporate in it the three-pronged test for obscenity set forth in Miller. That was done not by interpreting the statutory language, but by merely adding the Miller test to the statutory definition. In

other words, the Ohio Supreme Court left completely intact the definition of obscenity prescribed by Revised Code §2907.01 and simply appended the tripartite Miller formula.

The issue squarely confronting the court in this case in its present posture, then, is whether Revised Code §§2907.01 and 2907.32, as construed by the Supreme Court of Ohio, can be reconciled with the First and Fourteenth Amendments, as interpreted by the Supreme Court of the United States. In discussing this issue in the pages of this opinion that follow, this court will first review again what it believes the constitutional deficiencies of Ohio Revised Code §§2907.01 and 2907.32 as written to be. It will then demonstrate that the Supreme Court of Ohio did not cure the constitutional infirmities of these statutes by its decision in State v. Burgun, supra.

Stated simply, although the Ohio Supreme Court attempted to perform the "radical surgery"[1] which this court held would be necessary to save the Ohio obscenity statutes, it did not succeed.

A. As Written, Ohio Revised Code §§2907.01 and 2907.32 Are Unconstitutionally Overbroad

The Ohio definition of obscenity is set forth in Ohio Revised Code §2907.01, which provides, in pertinent part:

> As used in sections 2907.01 to 2907.37 of the Revised Code:
> (A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.
> (B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.
> (C) "Sexual activity" means sexual conduct or sexual contact, or both.
> . . .

1 Sovereign News, supra, at 448 F.Supp. 405.

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative

effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

In its initial decision in this case, this court found the definition of

obscenity set forth above to be unconstitutionally overbroad. This court's holding is synthesized in the following excerpt from its opinion:

> "The court finds that in four separate instances §2907.01 defines 'obscenity' in a manner that restricts constitutionally protected expression."
>
> "First: Section 2907.01(F)(1)(2)(3)(4) and (5) fail to incorporate the three-part Miller test. The Miller test is a conjunctive three part test, all parts of which must be satisfied before the material may be found obscene...However, under Ohio Revised Code §2907.01 material may be found obscene without the state being required to prove each of the three parts of Miller. An example of this is 2907.01(F)(1) which defines as 'obscene,' material whose '...dominant appeal is to prurient interest.' Under Subsection (F)(1), the Miller requirements that (b) the material be 'patently offensive' and (c) that 'taken as a whole, it lacks serious literary, artistic, political or scientific value,' need not be proven by the state before material can be found obscene. It is evident, therefore, that material which is not patently offensive, and which has, for example serious

literary value, may, under Ohio Revised Code §2907.01(F)(1), be found to be obscene. The Court concludes that Ohio R.C. §2907.01 restricts material which is not 'obscene,' making the statute overbroad."

"Second: Section 2907.01 (F)(3) unconstitutionally restricts the display or depiction of extreme or bizarre violence, cruelty or brutality. It is an express holding of Miller that only material depicting or describing sexual conduct may be barred as being obscene. See, Miller v. California, supra, 413 U.S. at 24, 93 S.Ct. 2607. Therefore, the restrictions placed on the description or depiction of extreme violence unconstitutionally restrains free expression, and the state is therefore overbroad.

"Third: Section 2907.01 (F)(1)(2)(3) and (5) unconstitutionally restrict the display and description of non-active sexual conduct. For example, simple nudity, such as the showing of a female breast or a male buttocks, may be considered obscene under §2907.01(F). A sexual depiction of that kind is not hardcore pornography, and cannot be restricted as being obscene...Therefore the court finds §2907.01(F)

(1)(2)(3) and (5) are overbroad in that they restrict non-hardcore sexual conduct.

"Fourth: Section 2907.01 (F)(1) does not define with the requisite specificity the sexual acts the description or depiction of which is restricted. Subsection (F)(1) declares that any material whose 'dominant appeal is to prurient interest' is obscene. The subsection is unconstitutionally overbroad because it does not list the types of sexual conduct to be restricted, and therefore may be applied to the depiction of sexual conduct not subject to restriction." Sovereign News Company v. Falke, supra, at 448 F.Supp. 400 (footnotes omitted).

The overbreadth of Ohio's definition of obscenity, as written, is as substantial as it is obvious. In the teeth of express holdings of the Supreme Court in such cases as Miller and Jenkins v. Georgia, 418 U.S. 161 (1974), that only patently offensive depictions of hardcore sexual conduct may be criminally punished, the Ohio obscenity law proscribes depictions of violence, cruelty, brutal-

ity, semi-nudity and even the touching of a thigh of another. Despite the Supreme Court's insistence that a state law include all three prongs of the test for obscenity announced in Miller, the Ohio statute is written in the disjunctive and permits a finding of obscenity even when one or two prongs of the Miller test are not satisfied. Revised Code §§2907.01 and 2907.32, as written, are substantially and unconstitutionally overbroad.

B. As Written, Revised Code §§2907.01 and 2907.32 Are Unconstitutionally Vague.

In its initial decision in this case, this court held that Ohio's definition of obscenity is unconstitutionally vague, because it fails to specify the kinds of sexual depictions which are proscribed. For example, Revised Code §2907.01(F), which is written in the disjunctive, provides

in subsection (1) that material is obscene if "[i]ts dominant appeal is to prurient interest." That subsection is impermissibly vague because it altogether neglects to specify sexual conduct, the depiction of which may be found obscene. As this court stated once before:

> "The Supreme Court has stated, "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.' Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). See, e.g., Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed. 2d 185 (1975); Smith v. Goguen, 415 U.S. 566, 572-573, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). Further, statutes which impinge on the area of freedom of expression must have a '...greater degree of specificity than in other contexts,' Goeguen, supra, 415 U.S. at 573, 94 S.Ct. at 1247, so as to insure that citizens will not be 'chilled' from exercising their constitutional right to free expression. See, e.g., Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d

(1)(2)(3) and (5) are overbroad in that they restrict non-hardcore sexual conduct.

"Fourth: Section 2907.01 (F)(1) does not define with the requisite specificity the sexual acts the description or depiction of which is restricted. Subsection (F)(1) declares that any material whose 'dominant appeal is to prurient interest' is obscene. The subsection is unconstitutionally overbroad because it does not list the types of sexual conduct to be restricted, and therefore may be applied to the depiction of sexual conduct not subject to restriction." Sovereign News Company v. Falke, supra, at 448 F.Supp. 400 (footnotes omitted).

The overbreadth of Ohio's definition of obscenity, as written, is as substantial as it is obvious. In the teeth of express holdings of the Supreme Court in such cases as Miller and Jenkins v. Georgia, 418 U.S. 161 (1974), that only patently offensive depictions of hardcore sexual conduct may be criminally punished, the Ohio obscenity law proscribes depictions of violence, cruelty, brutal-

Ohio was presented with a challenge to the constitutionality of Revised Code §§2907.01 and 2907.32. Specifically, the appellants in that case urged that those statutes are unconstitutionally overbroad and vague. The Ohio Supreme Court rejected those claims, however, and sustained the constitutionality of Revised Cose §§2907.01 and 2907.32.

That court conceded that Ohio's definition of obscenity, written in the disjunctive, does not on its face satisfy the Supreme Court's pronouncement in Miller v. California, supra, that a state law must define obscenity as only those materials which, taken as a whole, appeal to the prurient interest in sex; which portray specifically defined hard-core sexual conduct in a patently offensive way; and which, taken as a whole, lack serious, literary, artistic,

political or scientific value. But the Ohio Supreme Court paid particular attention to the statement in Miller that an otherwise unconstitutional obscenity law would be upheld by the United States Supreme Court if it were given an authoritative gloss by the state's judiciary which narrowed the statute to constitutionally permissible parameters. And without any hesitation or question whatsoever, the Ohio Supreme Court determined that it would try to save Ohio's obscenity law from federal constitutional attack by judicial construction.

Somewhat surprisingly, the Ohio Supreme Court made this determination without any discussion of the wisdom or propriety, from the perspective of state law and policy, of attempting to rewrite a legislative enactment. It did not consider whether the kind of judicial

gloss it was to place on the statute would constitute an infringement on the power of the legislature.[2] It failed to reflect upon whether or not interpreting a criminal statute in a way which is inconsistent with the statute's plain words can be reconciled with the legislature's intent in enacting the statute.[3]

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[2] In other contexts, the Ohio Supreme Court has demonstrated its acquaintance with this rule of judicial restraint. See State v. Young, 62 Ohio St. 2d 370, 374 (1980),"...a court, in interpreting a legislative enactment, may not simply rewrite it...."

[3] Numerous other state courts who have compared their state obscenity laws with Miller have found them wanting, have struck down the laws rather than attempt to rewrite them. ABC Interstate Theatres, Inc. v. State, 325 So.2d 123 (Miss. 1976)("We determined that the enactment of criminal offenses was best left to the legislature." Id., at 126). Commonwealth v. Horton, 365 Mass. 164, 310 N.E.2d 316 (1974) ("[W]e decline to undertake the task of trying to list the specific sexual conduct whose display or description §284 proscribes. To do so would constitute a judicial rewriting of that statute."310 N.E.2d at 321-322); Art Theater Guild Inc. v. Rhoades, 510 S.W. 2d 358 (Tenn.

Neither did the Ohio Supreme Court pause to consider this court's conclusion in its first opinion in this case that no reasonable judicial interpertation could repair the several defects in the

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3 cont.

1974)("The function of this Court is to interpret a statute... and we will not and cannot usurp the prerogatives of the legislature by supplying essential elements to a statute which have been omitted by that body." Id., at 261); State v. Wedelstedt, 213 N.W.2d 652 (Iowa 1973) ("No court under the guise of construction may extend, enlarge, or otherwise change the terms and meaning of a statute." Id., at 656). State v. Princess Cinema of Milwaukee, 292 N.W.2d 807 (Wisc. Supreme Court 1980)("The job of drafting of penal legislation is primarily one for the legislature. This court is once again being asked to judicially amend the obscenity statute to bring it into compliance with the presently perceived standards emanating from the United States Supreme Court.... We conclude, at this time, that this is a determination for the legislature." Id., at 292 N.W.2d 813-814); State v. New Horizons, Inc., No. 79SA322, (Colorado Supreme Court, Aug. 18, 1980) ("While we recognize a duty, whenever possible, to authoritatively construe a Colorado statute to conform to constitutional standards, we are bound by the clear language of the statute and must declare it unconstitutional." Id., at Slip Op. 12).

statute.[4] Rather, the Ohio Supreme Court immediately turned to its judicial business: the attempt to save Ohio's indefensive obscenity law from federal

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[4] "Section 2907.01 does not lend itself to a narrowing construction. The statute is so substantially overbroad that only radical surgery could save it. See Attwood v. Purcell, 402 F.Supp. 231, 234 (D. Ariz. 1975). For example, the statute defines the depiction of violence as 'obscene.' See Ohio Revised Code §2907.01 (F)(3). No reasonable judicial interpretation of this section can save it from unconstitutionally impinging on free expression. Another example is that the depiction of simple nudity is defined as obscene. See Ohio Revised Code §2907.01(F)(5) and (H). No gloss that would sufficiently narrow this section is reasonably available. Finally, each section of Ohio Revised Code §2907.01(F) lacks one or two parts of the three part Miller test. To restructure Ohio Revised Code §2907.01(F) into a conjunctive statute in order to satisfy the Miller test, when it is a disjunctive statute on its face, would require strained reasoning by an Ohio court. This court cannot presume Ohio courts will not interpret §2907.01 reasonably. The court concludes that §2907.01 is not readily subject to narrowing by state court interpretation. See, e.g., Allied Artists Pictures Corp. v. Alford, 410 F.Supp. 1348, 1356-1357 (W.D. Tenn. 1976); Attwood v. Purcell, 402 F.Supp. 231, 235 (D. Ariz. 1975); Stroud v. Indiana, Ind., 300 N.E.2d 100 (1973)." Sovereign News, supra, at 448 F.Supp. 405.

constitutional attack. That court concluded that such a result could be accomplished without modifying the statutory langauge itself but by merely adding to it the three-pronged Miller formula. In other words, the language of Revised Code §2907.01 was left completely intact, but added to the statutory language at the end was the Miller formula. The Ohio Supreme Court held as follows:

> "We hold that R.C. 2907.01 (F) is neither unconstitutionally overbroad nor void for vagueness when it is read in pari materia with the Miller decision. The Miller test for defining obscenity is therefore incorporated into that statute by an 'authoritative' state court construction specifically sanctioned by Miller. In addition, a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited. Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted

parameters, the appellants' proposition of law has no merit.

"In three of the four appeals before this court the trial court adhered to the foregoing interpretation of Ohio obscenity law. In each instance the jury was instructed initially under the Ohio statute and then given a 'narrowing' instruction restricting the definition of obscenity to the test laid down in Miller. In light of that interpretation and application of R.C. 2907.01(F) this proposition of law is not well-taken and hereby overruled, except in State v. Burgun, case No. 77-1144, where the failure to instruct on Miller was reversible error." State v. Burgun, supra, at 56 Ohio St. 2d 361-362.

This holding was reaffirmed by the Ohio Supreme Court in State v. Thomas, 57 Ohio St.2d 71 (1979).

This court, of course, is bound by the interpretation given by the Ohio Supreme Court to its own state law. Brown v. Ohio, 431 U.S. 161, 167 (1977); Aero Mayflower Transit Co. v. Board of R. Comrs., 332 U.S. 495, 499-500 (1947);

Kingsly Pictures Corp. v. Regents, 360 U.S. 684 (1959). Accordingly, in view of the judicial gloss placed upon Revised Code §2907.01 by the Ohio Supreme Court, the statute which this court must measure against federal constitutional commands is composed of the language of section 2907.01 followed by the language of the Miller formula. The result can be seen most vividly by examining the jury instructions on the question of obscenity given by the trial court in one of the three cases affirmed in Burgun, for the Ohio Supreme Court expressly held that those instructions constituted a correct statement of the definition of obscenity under Revised Code §2907.01, as interpreted by the Ohio Supreme Court.

> "'Obscene,' is defined as follows: When considered as a whole and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible

group, judged with reference to such group, any material or performance is obscene if any of the following apply:

(1) Its dominant appeal is to prurient interest.

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite.

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty or brutality.

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, moral, or artistic purpose.

And the last:

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre

violence, cruelty, brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

. . .

"The Court: In addition to the statute which I have read to you, which defines the term 'obscene,' the following additional factors must be taken into your consideration:

> According to the United States Supreme Court, the basic guidelines for the trier of facts must be:
>
> '(A) Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.
>
> '(B) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and

'(C) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.'" (Trial transcript, pp. 529-532 in State v. Krute, one of the cases consolidated and decided in State v. Burgun, supra.[5]

This court concludes that Revised Code §2907.01, as construed by the Ohio Supreme Court in Burgun, remains unconstitutionally overbroad. Indeed, the constitutional infirmities of that statute have been intensified, rather than relieved, by the Burgun decision.[6]

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5 Attached as an appendix to this opinion are the critical jury instructions given in the three cases affirmed in State v. Burgun, supra. The Ohio Supreme Court held, in Burgun, supra, that these instructions constituted correct recitals of the definition of obscenity under R.C. 2907.01

6 The decision in Burgun is reminiscent of the unsuccessful attempt by the Ohio Supreme Court to save Ohio's death penalty from constitutional attack by attempting to place a judicial interpretation on the death penalty statute which would reconcile it with the latest decisions of the United States Supreme Court on that subject. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2966-67, (1978).

This court takes no issue with the well-established principle that an otherwise constitutionally deficient statute may be saved by an authoritative construction of the state's highest court. Ward v. Illinois, 431 U.S. 767 (1977). But in order to save such an infirm legislative enactment from successful constitutional attack, the juducial gloss must actually cure the statutory defect. A mere conclusory determination that the statutory language meets constitutional muster will not suffice. Nor will a construction which reaches only a portion of the statutory defect be sufficient to withstand constitutional attack.

In the judgment of this court, the attempt of the Ohio Supreme Court in Burgun to provide an authoritative construction broad enough to overcome the constitutional deficiency of the

statute, has failed. It failed because what remains of the statute after such "authoritative construction" does not meet federal constitutional standards. It failed because its announcement that it was in the process of authoritatively construing the statute, was not borne out by its operative performance in its opinion. It failed because its attempted construction of a statute designed to identify an already exquisitely vague offense so muddied the legal standard by which guilt was to be ascertained as to make nonsense out of a criminal law which is bound to give clear notice of its content to every citizen.

The several material respects in which the Burgun decision has failed to shore up the sagging statute will be considered below.

1. The Ohio Supreme Court Did Not Narrow the Statutory Language Pertaining to the Kinds of Depictions Which May Be Found Obscene

In Burgun, the Ohio Supreme Court left the language of Revised Code §2907.01 intact. Instead, it attempted to remedy the statute by merely tacking onto it the three-pronged Miller formula, the second prong of which requires either the state legislature or the state courts to define with specificity what kinds of sexual depictions may be found obscene. The Ohio Supreme Court declined to specify what kinds of sexual depictions may be found obscene, however, and left the langauge of Revised Code §2907.01 completely intact to serve that purpose. The result is that the Ohio Supreme Court created a circular definition of obscenity which always leads to and depends upon the language employed in Revised Code §2907.01 itself.

The second part of the Miller test of obscenity, which has been added to Revised Code §2907.01 by the Burgun decision, reads as follows:

> "(b) whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the by the applicable state law; ...." Miller, supra, at 413 U.S. 24 (Emphasis added).

It is clear from this language that the Miller formula is not a self-sufficient definition of obscenity. On the contrary, Miller's second prong can be implemented only by legislation, or judicial interpretation of legislation, which specifically prescribed what types of sexual depictions or descriptions may be obscene. When, as is true of Revised Code §2907.01, the law as written lacks the requisite precision and censors expression which is constitutionally protected, Miller requires an authoritative construction

which affirmatively supplies the missing specificity and which limits the law's reach to a ban on designated hardcore pornography.

In the Burgun decision, however, the Supreme Court of Ohio declined to list what kinds of sexual depictions may be found obscene under Revised Code §2907.01. Instead, the court found that the statutory language alone and without judicial interpretation is narrow and specific enough to comply with Miller's second prong. The court expressly stated that Revised Code §2907.01 is"...extremely precise in defining what conduct is prohibited." Burgun, supra at 56 Ohio St. 361. Accordingly, in adding the Miller formula to Revised Code §2907.01, the Supreme Court of Ohio did not alter in any fashion the law's recital of the kinds of descriptions or depictions which may be found obscene in Ohio.

It is this feature of the Ohio Supreme Court's decision in Burgun which readily distinguishes this case from Ward v. Illinois, 431 U.S. 767 (1977). In that case, the petitioner attacked as unconstitutionally vague and overbroad the obscenity law of the state of Illinois. Illinois law defines obscenity, in relevant part, as follows:

> "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters...."

Although this statute, as written, clearly could not have survived Miller, the Supreme Court of the United States upheld its constitutionality because it had been given a saving judicial construction by the Illinois Supreme Court.

In numerous prior decisions, the Illinois Supreme Court had described in vivid detail the kinds of hardcore sexual conduct portrayed in materials validly found obscene under Illinois law. These decisions, the court held, afforded petitioner Ward adequate notice that his conduct was clearly within the statute's prohibition, thereby rendering his vagueness challenge to the statute without merit.

The petitioner's overbreadth argument was based upon his contention that the statute was not limited in its reach to only a ban on specifically defined hardcore pornography, as required by Miller v. California, supra. This argument too was rejected on the basis of the gloss that had been placed on the statute by the Illinois Supreme Court which narrowed the statute's scope to the kinds of sexual

depictions which the court in Miller listed as examples of what a state obscenity law could validly regulate.

In particular, the court pointed to one case in which the Illinois Supreme Court had adopted the first two prongs of the Miller guidelines as part of Illinois' obscenity law. In the same decision, the Illinois Supreme Court had construed its state law to include, in place of Miller's third prong, the more onerous "utterly without redeeming social value" standard of Memoirs v. Massachusetts, 383 U.S. 413 (1966).

Significantly, however, the court noted that the Illinois obscenity statute could not survive an overbreadth challenge merely because the first two prongs of the Miller test along with the Memoirs social value test had been incorporated into the statute. This is because the second prong of the Miller test expressly

commands that the state law, as written or as construed, specifically define the kinds of sexual conduct the representation or depiction of which may be obscene. Thus, if the Illinois Supreme Court had merely adopted part (b) of the Miller guidelines and "...did not go further and expressly describe the kinds of sexual conduct intended to be referred to under part (b) of the Miller guidelines...", Ward, supra, at 431 U.S. 775, the statute would have remained unconstitutionally overbroad.

The court concluded, however, that the Illinois Supreme Court had, in fact, added the requisite specificity to its statute by adopting not just part (b) of the Miller test but also the follwoing language from Miller in which the court gave examples of what a state could validly regulate under part (b) of the Miller test:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:
>
> '(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> '(b) Patently offensive representations or descriptions of masturbation, execretory functions, and lewd exhibition of the genitals." Miller, supra, 413 U.S. at 25 (footnotes omitted).

Because the Illinois Supreme Court had construed the state's obscenity law to incorporate Miller's second prong and Miller's explanatory examples, the court concluded that the statute was not subject to attack for overbreadth.

Several factors led the court to conclude that Illinois' highest court had

incorporated into the state's obscenity law not just part (b) of the Miller guidelines but Miller's explanatory examples as well. First, Illinois' obscenity law, as written, is completely open-ended. The Illinois Supreme Court must have been aware of Miller's specificity requirement and the fact that its state statute did not, as written, even arguably satisfy that requirement. Thus, the court must have intended to incorporate into that statute which readily lent itself to an appropriate narrowing interpretation, Miller's explanatory examples in order to supply the precision which the statute obviously lacked.

Second, in a later decision, the Illinois Supreme Court quoted at length from Miller, including the passage from Miller containing the explanatory examples given in that case. It then noted that

it had incorporated parts (a) and (b) of the Miller guidelines into the state's obscenity law in an earlier case and in so noting that fact referred directly to the Miller passage it had quoted. Because the quoted passage from Miller included Miller's explanatory examples, the court concluded that the Illinois Supreme Court had intended to adopt the Miller examples as well as the guidelines themselves.

Finally, the Illinois Supreme Court's application of the state's obscenity statute to particular cases reviewed by the court demonstrated its respect for the limitations imposed by the First Amendment upon the power of the states to proscribe expressive materials. In those cases in which the Illinois Supreme Court concluded that particular works could validly be found obscene under the state's law, the court's detailed de-

scription of the contents of those works left no doubt that those works vividly depicted, in a patently offensive way, numerous acts of sexual intercourse, masturbation, cunnilingus, fellatio, lesbian intercourse and other hardcore sexual conduct. Thus, the decisions of the Illinois Supreme Court applying the state's obscenity law to particular cases demonstrated that court's intention to narrow the reach of the state law to the kind of sexual depictions given as examples in Miller.

For these reasons, the court concluded that Illinois' highest court had incorporated both the Miller guidelines and the explanatory examples of Miller into the state's obscenity law. As so construed and narrowed, Illinois' obscenity law was not overbroad.

Precisely the opposite is true of Ohio's obscenity law as interpreted by

its highest tribunal. The evidence is clear and unmistakable that in Burgun the Ohio Supreme Court did not intend to incorporate Miller's explanatory examples into Revised Code §2907.01 or to narrow that law's reach to a prohibition on the depiction or description of the kinds of sexual conduct identified in Miller's explanatory examples.

First, unlike the Illinois Supreme Court, the Ohio Supreme Court has affirmed findings of obscenity in cases clearly not involving the kind of sexual depictions given as examples in Miller. State ex re. Keating v. Vixen, 35 Ohio St.2d 215, 301 N.E.2d 880 (1973), is a particularly apt example, because that case is cited with approval by the Ohio Supreme Court in Burgun. The decision in Vixen was the second one that had been rendered by the Ohio Supreme Court in that case.

The first time that court considered the case, it found that the film "Vixen" was obscene under Revised Code §2905.34, the predecessor to Revised Code §2907.01, and affirmed an injunction against the film's exhibition. State ex rel. Keating v. Vixen, 27 Ohio St. 2d 278 (1971). That decision was appealed to the United States Supreme Court, which vacated the judgment and remanded the case for further consideration in light of Miller and its companion cases. A Motion Picture Film Entitled "Vixen" v. Ohio, 413 U.S. 905 (1973).

On remand, the Ohio Supreme Court found that definition of obscenity then in force in Ohio comported, on its face, with Miller and that the film "Vixen" was, indeed, obscene. State ex rel. Keating v. "Vixen", 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973).

The film found by the Ohio Supreme Court to be obscene, even after Miller

was decided and considered, was described by the Ohio Supreme Court in its earlier opinion as follows:

> The principal character, Vixen, is a buxom young wife, whose "square" husband is a combination pilot and fishing guide in the wilderness of British Columbia. His work keeps him away from their home for extended periods of time. Among the other characters are Vixen's motorcycle hood brother, a Canadian Mountie, with whom Vixen passes the first few minutes of the film, a vacationing couple who are guest-clients of the husband, a black American whom Vixen despises and who has fled the country to avoid the draft, and an Irish communist who attempts at gun-point to force Vixen's husband to fly him to Cuba. The first four are objects of Vixen's lechery.
>
> The movie is approximately 70 minutes long, out of which approximately one-half deals with incest, adultery, and lesbianism, which are graphically portrayed through facial and bodily expressions indicative of orgasmic reaction. The remaining one-half of the movie leads the viewer through such contemporary issues as racism, anti-militarism, communism, and airplane hijacking.

> It should be noted that, although the players are frequently shown nude and at full length, at no place are their genital parts exposed to the leering lens of the camera.

(Emphasis added; 272 N.E.2d at 139).

The court further noted, at 272 N.E.2d 140:

> Assume, hypothetically that the main character in "The Sound of Music" performs, during one scene, an act of sexual lewdness, could we permit that part of the film to go unregulated merely because the producer had an "eye on the recent Supreme Court rulings?" The questions supplies its own answer.
>
> Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse.

(Footnotes omitted).

As described by the Ohio Supreme Court, the film "Vixen" clearly is not the kind of hardcore pornography which Miller permits the states to censor. Indeed, based

on the description given by the Ohio Supreme Court, "Vixen" is less explicit than the film found to be protected by the First Amendment in Jenkins v. Georgia, 418 U.S. 161 (1974).

Similarly, the Ohio Supreme Court's suggestion that "The Sound of Music" could be rendered obscene by the inclusion of a single act of sexual lewdness in one scene completely ignores what has been basic constitutional law since the 1957 decision of the Supreme Court in Roth v. United States, 354 U.S. 476 (1957) - that, in judging whether a work is obscene, it must be considered as a whole and in its entirety.

Thus, unlike the decisions rendered by the Illinois Supreme Court summarized in Ward, the decisions of the Ohio Supreme Court have not applied the state's obscenity statute only to works which depict the kinds of hardcore sexual con-

duct given as examples in Miller. For this reason, initially, this court concludes that in Burgun, which cited the Vixen decision with approval, the Ohio Supreme Court did not intend to adopt the Miller examples or to narrow the Ohio obscenity statute to the kinds of sexual depictions set forth in those examples.

Second, unlike Illinois' obscenity law, Ohio's law does not lend itself to an interpretation which incorporates Miller's explanatory examples. While subsection (F)(1) of Revised Code §2907.01, which defines as obscene any material whose "dominant appeal is to prurient interest," is open-ended, subsections (F)(2), (3), (4) and (5) are not. Those latter subsections define obscenity in detailed terms which substantially exceed and cannot be reconciled with the Miller examples. Revised Code §2907.01, unlike Illinois' open-ended law, simply is not

susceptible to an interpretation incorporating in it the Miller examples. This fact, along with the Ohio Supreme Court's statement in Burgun that it believes Revised Code §2907.01 to be "...extremely precise in defining what conduct is prohibited," Id. at 56 Ohio St.2d 361, leads to the inevitable conclusion that the court in Burgun did not adopt the Miller examples.

Third, the Ohio Supreme Court, in Burgun, quoted a passage from Miller which contained the three-pronged Miller test but which excluded the portion of the Miller decision which set forth examples of what a state could validly regulate under the second prong of the Miller test. By way of contrast, one of the Illinois Supreme Court decisions upon which the court in Ward relied to uphold Illinois' statute quoted the passage from

Miller which included the explanatory examples. The court, in Ward, found this fact to be very significant and concluded from it that the Illinois Supreme court had incorporated Miller's explanatory examples into the state's obscenity law.

Fourth, the jury instructions given in the three cases in which convictions were affirmed by the Ohio Supreme Court in Burgun are most revealing. The affirmance of those convictions was expressly based upon the fact that the jury instructions were given by the trial court in those cases conformed to the interpretation given to Revised Code &2907.01 by the Ohio Supreme Court in Burgun. The Ohio Supreme Court specifically held that those instructions represented correct recitals of the definition of obscenity under Ohio law, as construed in Burgun. In each of those three cases, the trial court read Revised Code §2907.01(F) to

the jury. It then read to the jury the three-pronged Miller test without any reference to Miller's explanatory examples. Thus, in each of those three cases the trial court's instruction to the jury on the second prong of the Miller formula was substantially as follows:

> "...Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." (From p. 532 of the trial transcript in State v. Krute, one of the cases affirmed in Burgun, supra.)

Given the fact that the Ohio Supreme Court affirmed the convictions in those three cases on the express ground that the jury instructions given by the trial courts correctly stated the definition of obscenity under Revised Code §2907.01, as construed in Burgun, the conclusion is inescapable that the Ohio Supreme Court did not incorporate into Ohio's obscenity law Miller's explanatory examples.

As a result, in order to withstand constitutional attack, Revised Code §2907.01 must meet, on its face, the requirement, under the second prong of the Miller formula, that a state obscenity law must be limited to a ban on the representation or description of specifically defined hardcore sexual conduct. As will be seen, however, Revised Code §2907.01 does not satisfy the constitutional requirement.

2. Under Revised Code §2907.01, As Construed by the Ohio Supreme Court, Non-Hardcore Sexual Depictions May Still Be Found Obscene.

Even after Burgun, subsections (F)(1), (2), (3) and (5) of Revised Code §2907.01, which remain in effect, still prohibit descriptions and depictions of non-hardcore sexual conduct. For example, simple nudity may still be found obscene under Revised Code §2907.101. And subsection

(H) of Revised Code §2907.01 defines "nudity" so broadly that it includes a depiction of a woman wearing an evening dress which exposes any portion of her breast "below the top of the nipple" and the showing of a male or female buttocks with "less than a full, opaque covering." Similarly, a depiction of "sexual activity" includes "sexual contact," which in turn includes a depiction or description of the mere touching by one person of the thigh of another person during a love scene. See Revised Code §2907.01(B) and (C). The decisions of the Supreme Court in Miller v. California, supra, and Jenkins v. Georgia, 418 U.S. 153, 162 (1974), make it clear that a state is constitutionally prohibited from defining obscenity so broadly. Because, under Burgun, in contrast to the decisions of the Illinois Supreme Court noted in Ward, depictions of nudity, semi-nudity,

touching by one person of the thigh of another and other non-hardcore sexual depictions may still be found obscene under Ohio's law, Revised Code §2907.01 remains substantially and unconstitutionally overbroad.

Indeed, a recent decision by the Court of Appeals of the First Appellate District of Ohio reveals, in an ironic way, the failure of the Burgun decision to deal with the overbreadth of Revised Code §2907.01 and the confusion created by the Burgun decision for the lower courts which must deal with the always difficult issues raised in obscenity prosecutions. State v. Sovereign News Company, No. C77676 (Hamilton County, Ohio, Court of Appeals, September 3, 1980). In that decision, the court rejected a challenge to the constitutionality of Ohio's obscenity statute because it felt bound

by the Burgun decision. Yet it reversed a conviction under the statute because it found the search warrant used to obtain the charged materials to be overbroad, in violation of the Fourth Amendment, since the warrant contained the same statutory language and thereby impermissibly authorized seizure of materials protected by the First Amendment. The court stated as follows:

> "Preliminarily, it is fair to note that the instant search warrant presents at least one feature of specificity not found in [Stanford v. Texas, 379 U.S. 476 (1965); Marcus v. Search Warrants, 367 U.S. 717 (1961); Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)]: here the materials to be seized were qualified as or limited to those depicting sexual activitiy,' a concept arguably more precise and specific than 'obscene.' Unfortunately, the term 'sexual activity' is a phrase of art in Ohio, bearing a specific meaning defined by statute. Thus, R.C. 2907.01 defines the phrase as follows:

"(C) 'Sexual activity' means sexual conduct or sexual contact, or both.

In turn, the same statute defines those two latter concepts in the following language:

"(A) 'Sexual conduct' means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

"(B) 'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

"While a serach warrant limited to material depicting 'sexual conduct,' as defined above, could arguably meet Fourth Amendment standards of specificity, it is difficult to conceive that depictions of 'sexual contact' would invariably or even usually constitute obscenity. Certainly it is possible to imagine depictions of a R.C. 2907.01(B) 'touching' which meet the Miller v. California, supra, criteria; but it is equally possible to imagine quite innocent, or at least non-pornographic, represen-

tations of such tactile encounters." (Slip Op. at 12-13; footnotes omitted.)

As a result of Burgun, the court had to reject the claim that Revised Code §2907.01 represents an unconstitutional restriction on expression which is constitutionally protected. Yet it struck down a search warrant on the ground that the very same statutory language could not be used in a search warrant without rendering the warrant overbroad on the ground that it authorizes seizure of constitutionally protected materials.

This decision by an intermediate state appellate court serves to illustrate how the Ohio Supreme Court in Burgun has aggravated, rather than solved, the constitutional problems which permeate Revised Code §2907.01.

3. Under Revised Code §2907.01, As Construed by the Ohio Supreme Court, Depictions of Violence, Cruelty and Brutality May Still Be Found Obscene.

In Burgun, the Ohio Supreme Court left intact the statutory language which prohibits depictions of extreme or bizarre violence, cruelty or brutality found in subsections (F)(3) and (5) of Revised Code §2907.01. That court did not construe, interpret or limit that language in any way. The statute remains constitutionally overbroad, therefore, because it restricts expression protected by the First Amendment. As this court stated in its first decision in this case:

> "...It is an express holding of Miller that only material depicting or describing sexual conduct may be barred as being obscene. See Miller v. California, supra, 413 U.S. at 24, 93 S.Ct. 2607. Therefore, the restrictions placed on the description or depiction of extreme violence unconstitutionally restrain free expression, and the statute is therefore overbroad." Sovereign, supra at 448 F.Supp. 400 (Emphasis added).

4. Under Revised Code §2907.01, as Construed by the Ohio Supreme Court, Sexual Depictions Protected by the First Amendment May Still Be Found Obscene.

In Burgun, the Ohio Supreme Court determined that Revised Code §2907.01(F) is sufficiently precise in defining what depictions may be found obscene. That court, therefore, found it unnecessary to add any further specificity to the statute. Instead, it merely added at the end of the statute the Miller guidelines while leaving Revised Code §2907.01 (F) intact because, in its view, the statute itself is adequate to satisfy the command of Miller that a state law must be limited in its scope to materials which describe or depict "...sexual conduct specifically defined by the applicable state law." Miller, supra, at 413 U.S. 24.

At the same time, the Ohio Supreme Court recognized that Revised Code §2907.01

(F) is written in the disjunctive. In Burgun, the Ohio Supreme Court did nothing to change this basic statutory structure. Thus, even after Burgun, each one of the five subsections of Revised Code §2907.01 (F) defines independently what kinds of depictions are within the statute's reach. At most, then, the Burgun decision stands for the proposition that material may be found obscene in Ohio if it satisfied the first and third prongs of the Miller test and any one of the five definitions set forth in Revised Code §2907.01(F), each of which, the Ohio Supreme Court determined, is adequately precise to meet the specificity requirement set forth in part (b) of the Miller guidelines.

But subsection (1) of the Revised Code 2907.01(F) defines as obscene any material whose "dominant appeal is to prurient interest." That subsection

altogether fails to define the sexual conduct the depiction of which is within its inhibition. The subsection is, therefore, unconstitutionally vague. Its open-ended nature also renders it impermissibly overbroad because it may be applied to restrict sexual depictions protected by the First Amendment.

D. As Construed by the Ohio Supreme Court, Revised Code §2907.01 Remains Unconstitutionally Vague.

The Ohio Supreme Court specifically declined to specify the kinds of sexual conduct whose depiction may be found obscene under Revised Code §2907.01. Instead, that court concluded that the statute on its face is sufficiently precise to overcome a vagueness challenge. This court came to an opposite conclusion in its first opinion in this case. After careful reconsideration in the light of Burgun, this court remains convinced that

Revised Code §2907.01 is unconstitutionally vague. Certainly, the addition of the Miller test at the end of the statute, without the Miller examples, does not add the necessary specificity to save the statute. For example, subsection (1) of the Revised Code §2907.01(F) remains completely open-ended and nowhere specifies the sexual depictions proscribed by its terms. Revised Code §2907.01, therefore, remains unconstitutionally vague even after Burgun.

In fact, the Burgun decision has exacerbated, rather than alleviated, the vagueness of Revised Code §2907.01. By tagging onto the end of a five-part disjunctive statute, by judicial amendment, the three-pronged conjunctive test of Miller, the Ohio Supreme Court has created more, rather than less, confusion in this already exquisitely vague area.

The confusion is heightened by the fact that the Miller guidelines are altogether inconsistent with the statutory language to which those guidelines are now appended. Prosecutors, policemen and juries are now informed that the State of Ohio defines obscenity in one way but that the Supreme Court of the United States defines it in another way. It is left to them to decide, on an ad hoc basis, if and how these inconsistent sets of criteria can be harmonized. And potential violators of this new mixture of statutory and constitutional law have no way of knowing by which of two different tests the lawfulness of their conduct will be measured.

Revised Code §2907.01, as construed by the Ohio Supreme Court, is unconstitutional under the First and Fourteenth Amendments due to vagueness.

CONCLUSION

For all of these reasons, this court finds that the Ohio obscenity statutes remain, even after the Burgun decision, void for overbreadth and vagueness.

There are those who will complain that this federal court has not paid sufficient deference to the decision of a high state tribunal. Nothing could be further from the truth. Our scheme of federalism quite properly permits - in fact, requires - a state court to interpret its own legislation, and measure it against federal as well as state constitutional standards. It is altogether appropriate that state courts do so. Because this court feels so strongly that this legitimate state judicial function should be encouraged, it has spent many hours examining the Burgun opinion in an attempt to avoid the disparate result reached here.

But the federal court system has its own responsibility, quite apart from the state's obligation to perform its constitutional duty. The federal court is obliged to protect the federal rights of all within its reach. That obligation is intensified when the state courts have failed to do so.

This court does not believe that the federal court system need wither away so that the state legal system may survive. The dual legal systems are partners in the business of protecting the rights of their constituents. A proper approach to federalism lies in the recognition of the fact that a citizen is entitled to have his liberty protected by both the state in which he resides and the nation to which he pledges his allegience, and in the understanding that when one sovereignty fails to provide him justice,

he may look to the other for the relief which the Constitution guarantees him.

With this understanding of its responsibility, this court cannot rubberstamp the result reached by the Ohio Supreme Court in Burgun.

In the vague area of obscenity, the Burgun decision has further obfuscated an already unclear law, and has guaranteed that future prosecutions under it will be fundamentally suspect. Nor has that overbroad legislative enactment been brought, by judicial construction, within constitutionally acceptable limits. This court can neither ignore these salient consequences, nor its own constitutional duty. It therefore finds Ohio Revised Code §§2907.01 and 2907.32, as construed by State v. Burgun, to be void for overbreadth and vagueness.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

Case No. 76 CR 627
Court of Appeals No. 36264
Supreme Court No. 77-1154

CITY OF CLEVELAND

vs.

THOMAS BAYLESS

JURY CHARGE
Excerpt from Transcript of Proceedings

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the mind of the defendant, an awareness or belief that he did participate in presenting an obscene performance where an admission price was charged.

"Performance" means any motion picture, preview, trailer, play, show, skit, dance or other exhibition performed before an audience.

"Obscene" means when considered as a whole and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such a group, any material or performance is "obscene" if the following apply:

(1) Its dominant appeal is to the prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement or nudity in a way which tends

to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodiy functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty or brutality or human bodily functions of elimination, the cumulative effect of which is dominant tendency to appeal to prurient or

scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose.

In addition to the statute which I have read to you which defines the term obscene, the following additional factors must be taken into your consideration.

According to the United States Supreme Court, the basic guidelines for the tryor of the fact -- and that is the jury -- must be:

(A) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(B) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable State law; and

(C) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

All three of these factors must be considered by you, and in order to find that the material involved in this matter is obscene, you must find that all three factors are present in this case.

"Sexual activity" means sexual conduct or sexual contact, or both.

"Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

"Fellatio" means sexual activity committed with a male sexual organ with the mouth.

"Cunnilingus" means sexual activity committed with the mouth on the female

sexual organ.

"Sexual excitement" means the condition of human male or femal genitals when in a state of sexual stimulation or arousal.

"Nudity" means the showing, representation or depiction of human male or femal genitals, pubic area or buttocks with less than a full, opaque covering or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

Now, you must not discuss or consider the subject of punishment. Your duty is confined to the determination of the guilt

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

Case No. 75 CRB 17311
Court of Appeals No. 36368
Supreme Court No. 77-1155

STATE OF OHIO

vs.

FRANK TUROSO

JURY CHARGE
Excerpt from Transcript of Proceedings

The second is the word or term obscene.

The third is the work participant or participation, and the fourth is admission.

I am now going to define for you each of these four terms.

When I say admission to you it is meant to mean admission charge. We will get to that later.

The first item I am going to define for you as a matter of law which you are obliged to follow is, knowledge, knowledge of the character and content. What does the word knowledge mean? This is what it means: A person acts knowingly regardless of his purpose when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of the circumstances when he is aware that such circumstances probably exist.

The next item that I am going to define for you is the word or term "obscene." This is what the word or term in this case means: When considered as a whole and judged with reference to ordinary adults, or if it is designed for sexual gratification or other specially susceptible groups judged with reference to such group any material or performance is obscene if any of the following apply. Now, there is five of them.

Number one, "its dominant appeal is to prurient interests;"

Number two, "its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;"

Number three, "its dominant tendency is to arouse lust by displaying or

depicting bestiality or extreme or bizarre violence, cruelty, or brutality;"

Number four, "its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;"

Fifth and last, "it contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interests, when the appeal to such an interest is primarily for its

own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose."

That, ladies and gentlemen of the jury, is the definition of the term obscene which you are obliged to follow.

Now, I have defined for you knowledge. I have defined for you obscene. There are two more of the four essential elements.

MR. YASINOW: Your Honor.

THE COURT: Yes.

(Discussion had off the record.)

THE COURT: In a moment I am going to define for you the word participation and the word admission pertaining to admission charge, but I am now going to clarify for you further the term obscene. I want you to know the following: In addition to the statute I have read to you which defines the term obscene, the

following additional factor must be taken into your consideration. According to the United States Supreme Court, the basic guidelines for the trier of the fact must be "whether the average person applying contemporary community standards would find that the work taken as a whole appears to the prurient interest, whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable statute law, whether the work taken as a whole lacks serious literary, artistic, political or scientific value.

The area from which the contemporary community standards is to be judged is that of the limits of the City of Cleveland.

What does the work "participant" mean, or "participation"? It is simply the understanding that an ordinary reasonable

following additional factor must be taken into your consideration. According to the United States Supreme Court, the basic guidelines for the trier of the fact must be "whether the average person applying contemporary community standards would find that the work taken as a whole appears to the prurient interest, whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable statute law, whether the work taken as a whole lacks serious literary, artistic, political or scientific value.

The area from which the contemporary community standards is to be judged is that of the limits of the City of Cleveland.

What does the work "participant" mean, or "participation"? It is simply the understanding that an ordinary reasonable

person would have of the word participant or participation.

What does the word "admission" as it might apply to admission charge, mean? Again, it is the same thing. It is the understanding which an ordinary reasonable person would have of the term admission or admission charge.

You may not find the defendant guilty unless you find beyond a reasonable doubt that on or about July 3rd, 1975 Mr. Frank Turoso had knowledge of the content and character of the particular film which you have seen presented here in Court.

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

Case No. 75 CRB 14419
Court of Appeals No. 36092
Supreme Court No. 77-1279

STATE OF OHIO

vs.

WILLIAM KRUTE

JURY CHARGE
Excerpt from Transcript of Proceedings

---

is charged."

The essential elements of this crime, each of which the State, the prosecution, must prove beyond a reasonable doubt, are as follows: Knowledge. It is defined as follows: A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

The next element that must be proved by the State beyond a reasonable doubt is the word "obscene."

"Obscene," is defined as follows: When considered as a whole and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged

with reference to such group, any material or performance is obscene if any of the following apply:

(1) Its dominant appeal is to prurient interest.

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite.

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty or brutality.

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educa-

tional, sociological, moral, or artistic purpose.

And the last:

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose.

The authorized elements of this crime which the State of Ohio--

MR. YASINOW: Your Honor, may I?

The COURT: Yes.

(Thereupon, discussion was had between Court and counsel, out of the hearing of the jury, and off the record:)

THE COURT: In addition to the statute which I have read to you, which defines the term "obscene," the following additional factors must be taken into your consideration:

According to the United States Supreme Court, the basic guidelines for the trier of facts must be:

"(A) Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.

"(B) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable State law," and:

"(C) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

The area from which the contemporary community standard is to be judged is that of the limits of the City of Cleveland.

There are two other terms or elements

SECOND JUDGMENT ORDER OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SOVEREIGN NEWS COMPANY,	)	CASE NO. C77-230
	)	
	)	Judge John M.
Plaintiff,	)	Manos
	)	
v.	)	
	)	O R D E R
LEE C. FALKE, et al.,	)	[Entered Sept. 19, 1980]
	)	
Defendants.	)	

Pursuant to the Memorandum of Opinion issued in the above-captioned case on this date, the Court finds Ohio Revised Code §§2907.01 and 2907.32 to be void for overbreadth and vagueness.

IT IS SO ORDERED:

/s/ John M. Manos
United States
District Judge

[Order of the Supreme Court Denying Certiorari To Review First Opinion of the Sixth Circuit]

Roy WARNER, et al., petitioners, v. SOVEREIGN NEWS COMPANY, et al. No. 79-1671

Facts and opinion, Sovereign News Co v. Falke, D.C., 448 F.Supp. 306; Sovereign News Company v. Corrigan, 610 F.2d 428.

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

June 16, 1980. Denied.

FIRST OPINION AND JUDGMENT
OF THE SIXTH CIRCUIT

SOVEREIGN NEWS COMPANY,

Plaintiff-Appellee,

v.

John T. CORRIGAN, Prosecuting Attorney, et al., Defendants-Appellants.

Nos. 78-3064 to 78-3066.

United States Court of Appeals,
Sixth Circuit.

Argued Oct. 4, 1979.

Decided Dec. 7, 1979.

Rehearing and Rehearing En Banc
Denied Jan. 22, 1980.

Appeal from the United States District Court for the Northern District of Ohio; John M. Manos, Judge.

Timothy J. Armstrong, Asst. Pros. Atty., Cleveland, Ohio, for John T. Corrigan.

Bernard A. Berkman, Berkman, Gordon, Kancelbaum & Levy, Cleveland, Ohio, for Sovereign News Co.

James A. Brogan, Asst. Prosecutor, Gary W. Crim, Dayton, Ohio, for Lee C. Falke.

Thomas V. Martin, Asst. Atty. Gen., Columbus, Ohio, for amicus curiae Atty Gen. of Ohio.

Jack M. Schulman, Director of Law, City of Cleveland, Donald F. Black, Bruce A. Taylor, Bertsch, Edelman & Fludine Co., LPA, Cleveland, Ohio, for Cleveland Police Officers.

Before EDWARDS, Chief Judge, KEITH, Circuit Judge, and PHILLIPS, Senior Circuit Judge.

PER CURIAM.

These consolidated appeals are from the decision of the district court reported at 448 F.Supp. 306, rendered October 31, 1977, holding parts of the Ohio obscenity statute, R.C. Ohio §§2907.01(F) and 2907.32, to be unconstitutionally over-

broad and vague under Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

On December 7, 1978, the Supreme Court of Ohio rendered an opinion in State of Ohio v. Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978), holding that the Ohio statute when construed to incorporate the guidelines of Miller v. California, is valid and constitutional. The first syllabus, prepared by the Supreme Court of Ohio, is as follows:

> R.C. 2907.01(F), which sets forth the definition of "obscenity," is neither unconstitutionally overbroad nor void for vagueness when it is authoritatively construed to incorporate the guidelines prescribed in Miller v. California, 413 U.S. 15, [93 S.Ct. 2607, 37 L.Ed.2d 419].

56 Ohio St.2d at 354, 384 N.E.2d at 255.

Upon consideration of the briefs, oral arguments of counsel and the entire record, it is ORDERED that these cases be remanded to the district court for further consid-

eration in the light of the decision of the Supreme Court of Ohio in State of Ohio v. Burgun.

FIRST JUDGMENT ORDER OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

SOVEREIGN NEWS CO. 2075 East 65th St. Cleveland, Ohio Plaintiff, v. LEE C. FALKE Prosecuting Attorney for Montgomery County, Ohio 41 N. Perry Street Dayton, Ohio and E.R. ROBINSON and C.L. DALRYMPLE c/o Department of Police City of Dayton and JOHN T. CORRIGAN Prosecuting Attorney for Cuyahoga County, Ohio Justice Center 1200 Ontario Street Cleveland, Ohio and	CASE NO. C77-230 Judge John M. Manos [Entered Oct. 31, 1977]

ROY WARNER, L.)
THOMPSON, JOHN)
CRAWFORD, ARCHIE)
CATAVOLOS, KENNETH)
WHITE, WILLIAM POE,)
RICHARD B. MILLETT,)
JOHN H. DEVINE,)
JAMES LYNSKY,)
VINCENT G. KRAWULSKI,)
CARL DELAU, ANDREW)
S. VANYO, JAMES)
KENNELLEY, ROBERT)
J. CERMAK, HENRY)
YISHA, GREGORY KUNZ,)
B. JONES, RICHARD)
McINTOSH, JOHN)
McNAMARA, EDWARD C.)
LOUCAS, SAMUEL)
HENNIE, CHARLES)
BERKEY, ROBERT)
O'BRIEN)
c/o Department of)
Police)
City of Cleveland)
)
and)
)
the following)
members of the)
Police Department of)
the City of)
Cleveland, Ohio,)
whose full names are)
unknown at this time)
KAMINSKI, BANYON,)
McGREER (Badge No.)
1583), and JOHN DOE)
I, JOHN DOE II and)
JOHN DOE III,)
)
Defendants.) JUDGMENT ORDER

Based on the Memorandum of Opinion filed in this case today, which Memorandum of Opinion is fully integrated in this Judgment Order, the court orders that:

(1) It will abstain, under the doctrine of Younger v. Harris, from deciding Sovereign's declaratory judgment and preliminary injunction claims against the Montgomery County defendants, Lee Falke, E.R. Robinson, and C. L. Dalrymple, and therefore, the court dismisses those claims against those defendants;

(2) The court will not abstain from deciding Sovereign's declaratory judgment and preliminary injunction claims against the Cleveland police officer defendants and Cuyahoga County Prosecutor John T. Corrigan under either the Younger v. Harris or the Pullman abstention doctrines;

(3) For the reasons stated in the court's Memorandum of Opinion, the court

issues a declaratory judgment for Sovereign, and against the Cleveland police officer defendants and John T. Corrigan, holding Ohio's pandering obscenity statutes, Ohio Revised Code §§2907.32 and 2907.01(F), unconstitutional because those statutes violate the First Amendment to the United States Constitution;

(4) For the reasons stated in the Memorandum of Opinion, the court issues a preliminary injunction against the Cleveland police officer defendants and John T. Corrigan restraining those defendants from enforcing Ohio Revised Code §§2907.32 and 2907.01(F), either alone, or in conjunction with other statutes, against the Sovereign News Company, Sovereign's owners, or Sovereign's employees;

(5) The court retains jurisdiction over all other claims in Sovereign's

complaint, including the damage and permanent injunction claims against all defendants.

IT IS SO ORDERED.

/s/ John M. Manos
United States
District Judge

ORDER OF THE DISTRICT COURT
RE: CONSOLIDATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

SOVEREIGN NEWS, CO.,	)	CASE NO. C77-230
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
LEE C. FALKE, et al.,	)	O R D E R [Entered Apr. 1, 1977]
	)	
Defendants	)	

Manos, J.

During the hearings conducted on this matter from March 29, 1977 to March 31, 1977, the Court, relying on Fed. R. Civ. P. 65(a)(2) consolidated the plaintiff's claim for a permanent injunction with its motion for a preliminary injunction. The Court also stated that it would not hear the plaintiff's damages claims at this time, but that it would consolidate the plaintiff's request for a declaratory judgment with the hearing on the preliminary and permanent injunctions. Some

of the defendants objected both to the consolidation of the preliminary injunction with the permanent injunction and to the consolidation of the declaratory judgment question with the injunction issues.

After receiving briefs on the consolidation questions, the Court is concerned that merger of thepreliminary injunction with the permanent injunction may prematurely involve the Court in the resolution of facts, such as whether the police officers who executed the warrant in this case acted in good faith, which, under the Seventh Amendment, should be resolved by a jury when it hears the 42 U.S.C. §1983 damage claims at a later time. Compare, Amburgey v. Cassady, 507 F.2d 728, 730 (6th Cir., 1974). The Court seeks to avoid deciding any facts which might deprive any party of the right

to a jury trial. See, Dairy Queen v. Wood, 369 U.S. 469, 479 (1962). However, this problem can be avoided, without prejudice to any party, by severing the preliminary injunction from the permanent injunction. See, Dairy Queen, supra at 479, footnote 20, citing with approval, McCullough v. Dairy Queen, 290 F.2d 871 (3rd Cir., 1961); Moore's Federal Practice ¶65.04(6), pages 65-70 and 65-71; Berrigan v. Sigler, 499 F.2d 514, 518, footnote 11 (determinations regarding preliminary injunctions are not rigidly binding on the merits). Therefore the Court, exercising its broad discretion under Fed. R. Civ. P. 65(a)(2), orders the permanent injunction severed from the preliminary injunction and states that it will treat the recently concluded hearing as one dealing with the preliminary injunction. The permanent injunction will be heard at a later time.

The Court is also concerned that by consolidating the plaintiff's §1983 declaratory judgment claims with the hearing on the preliminary injunction, it may be called upon to make factual determinations which a jury must decide according to the mandate of the Seventh Amendment. See, Amburgey, supra at 730; Beacon Theatres Inc. v. Westover, 359 U.S. 500, 504, 510-511 (1959). However, the plaintiff has asked this Court for a declaratory judgment holding Ohio Revised Code Sections 2907.32, 2907.01, and 2923.04 unconstitutional. See, Plaintiff's Complaint, page 7, ¶D. The determination of the constitutional validity of statutes is a question of law on which none of the parties are entitled to a jury trial and which must be decided by the Court alone. The Court consolidates the plaintiff's

declaratory judgment claim with the hearing on the preliminary injunction only with respect to the issue of the constitutional validity of Sections 2907.32, 2907.01, and 2923.04. The Court will not now entertain consideration of the plaintiff's declaratory judgment claims other than the claim that Sections 2907.32, 2907.01, and 2923.04 violate the United States Constitution.

The Court reiterates its earlier ruling that it will not consider the plaintiff's money damages claims at this time.

The Court further orders each defendant to file an answer to the plaintiff's complaint by not later than April 12, 1977. See, Fed. R. Civ. P. 12(a).

IT IS SO ORDERED.

/s/ John M. Manos
John M. Manos,
U.S. District Judge

Nos. 80-3696, 3728, 3742, 3743, 3817 and 81-3127

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FRANK TUROSO,
Petitioner-Appellee (80-3742/3),
Petitioner-Appellant (80-3696),

LAURA SPIKER,
Petitioner-Appellee (80-3728),

DALENE BURGUN,
Petitioner-Appellant (80-3817),

WILLIAM LEE,
Petitioner-Appellee (81-3127),

v.

THE CLEVELAND MUNICIPAL COURT, THE HONORABLE SALVATORE CALANDRA, RICHARD M. BRENNAN, FRANK O'BELL and WILLIAM J. BROWN,
Respondents-Appellees (80-3696) (80-3817),
Respondents-Appellants (80-3728, 3742, 3743 and 81-3127).

APPEAL from the United States District for the Northern District of Ohio.

Decided and Filed February 4, 1982.

Before: ENGEL and MERRITT, Circuit Judges and HOGAN, District Judge.*

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* Hon. Timothy S. Hogan, Senior Judge, United States District Court for the Southern District of Ohio, sitting by designation.

ENGEL, Circuit Judge, delivered the opinion of the court, in which HOGAN, District Judge, joined. MERRITT, Circuit Judge (pp. 19-23), delivered a separate dissenting opinion.

ENGEL, Circuit Judge. In these six consolidated appeals, four habeas corpus petitioners assert that their convictions were invalid because the Ohio obscenity statute under which they were charged is constitutionally overbroad and vague. It is vague, they claim, because its language is confusing and fails to apprise them and others of what conduct is proscribed by the statute. It is overbroad, they claim, because it proscribes conduct which is protected expression under the First and Fourteenth Amendments.

We are presented in these appeals with no other issues, although others were raised in direct appeals to Ohio's appellate courts, and in the petitions filed in the district courts pursuant to 28 U.S.C. § 2254.

Although each appeal reaches us in a somewhat different posture, each has certain aspects in common with the others. All petitioners were found guilty of a violation of Ohio's pandering statute, Ohio Rev. Code § 2907.32, following jury trials in the Cleveland Municipal Court. Those trials took place before the Supreme Court of Ohio determined that the Ohio statute was neither overbroad nor vague when read in *pari materia* with the requirements of *Miller* v. *California*, 413 U.S. 15 (1973). *See State* v. *Ronald Burgun, et al.*, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978).[1] Nonetheless, the trial judge in each trial instructed the jury by reciting the provision of Ohio Rev. Code § 2907.01(F), defining "obscene" material or performance, and also by reciting the three basic guidelines in obscenity cases as set forth in *Miller*.

All petitioners requested habeas relief following various

[1] Ronald Burgun is not to be confused with one petitioner here, Dalene Burgun (No. 80-3817). One of the petitioners before us today had his state appeal considered by the Supreme Court of Ohio as a companion case to *Burgun*. Appeal No.80-3743 (Turoso I).

appeals in the state court system. Habeas relief was granted in four cases and was denied in two cases. Of the four judges of the United States District Court for the Northern District of Ohio considering the issue, two judges (District Judges John M. Manos and Ann Aldrich) concluded that the statute was both overbroad and vague, and two judges (Chief Judge Frank Battisti and Senior District Judge William K. Thomas) concluded that the statute was constitutionally valid. The contrary views are set forth in two extensive opinions written by Judge Manos,[2] holding the statute invalid, and in extensive but unpublished opinion filed by Senior Judge Thomas upholding the statute. *Turoso* v. *Cleveland Municipal Court*, No. C79-1010 (N.D. Ohio September 15, 1980), Appeal No. 3696 (Turoso III).

In *Ward* v. *Illinois*, 431 U.S. 767 (1976), the Supreme Court found that state courts may "authoritatively construe" an otherwise defective statute to conform to the *Miller* requirements. Following the guidance of *Ward*, another panel of this court, of which the writer of this opinion was also a member, has thus specifically upheld the statute in response to claims of facial invalidity due to overbreadth and vagueness. *Sovereign News Co.* v. *Falke*, — F.2d — (6th Cir. 1981). The panel found that any infirmities which may exist in the statutory language have been cured by the Ohio Supreme Court's incorporation of the *Miller* guidelines and examples in *Burgun*, *supra*. This holding would appear to lay to rest the issues framed in these appeals as well, since they are similarly limited to questions of constitutional infirmity of the statute as a whole. However, the decision in *Sovereign* addresses itself only to declaratory and injunctive relief under 42 U.S.C. § 1983 against anticipated but largely unrealized injury. Because these appeals arise in the setting of habeas

[2] One opinion was published and one was not. *See Sovereign News* v. *Falke*, No. C77-230 (N.D. Ohio, September 19, 1980) ("Sovereign II"); *Sovereign News* v. *Falke*, 448 F.Supp. 306 (N.D. Ohio 1977) ("Sovereign I").

corpus relief sought after actual conviction for violation of the statute, we discuss the subject more specifically here to highlight problems peculiar to actual prosecutions.

I.

Section 2907 of the Ohio Revised Code deals with three categories of sex-related crimes: sexual assaults and displays (Ohio Rev. Code §§ 2907.02-2907.09); prostitution offenses (Ohio Rev. Code §§ 2907.21-2907.27); and offenses related to the dissemination of obscenity and matter harmful to juveniles (Ohio Rev. Code §§ 2907.31-2907.37).

The four habeas petitioners here were each charged with violation of Ohio Rev. Code § 2907.32(A).[3] Petitioners Lee

---

[3] Ohio Rev. Code § 2907.32(A) provides in relevant part:

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

and Spiker were charged with violation of section 2907.32(A)(4), while petitioners Burgun and Turoso were charged with violating Ohio Rev. Code § 2907.32(A)(2).

The actual instructions given by the state trial judge in each of the underlying state prosecutions leave much to be desired by way of clarity, but it is fair to observe that in each case the jury was instructed as to the basic elements of the crime under which the particular petitioner was charged under Ohio Rev. Code § 2907.32. The jury was further read the specific definitions of "obscene material or performance," as contained in Ohio Rev. Code § 2907.01(F). The jury was also instructed that to convict the particular defendant it must find that the particular material or performance meets the three guidelines of *Miller*:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) whether the work depicts in a patently offensive way, *sexual conduct specifically defined by the applicable state law*; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. *California*, *supra*, 413 U.S. at 24 (emphasis added).

The so-called "*Miller* examples" were not included by any of the trial court judges in their instructions as illustrations of specific sexual conduct.[4] Ohio Rev. Code § 2907.01 specifically defines "sexual conduct."

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[4] In addition to the three guidelines set forth by *Miller*, that decision, while not endeavoring to limit otherwise what conduct might be specifically defined by state law as "sexual," gave two permissible "examples":

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
> (b) Patently offensive representations of masturbation, excretory functions and lewd exhibitions of the genitals.

Miller v. *California*, 413 U.S. 15, 25 (1973).

As used in section 2907.01 to 2907.37 of the Revised Code:

> (A) "Sexual conduct" means vaginal intercourse between a male and a female, and anal intercourse, fellatio and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

However, the respective juries received instructions including this definition in only two appeals, Appeal No. 80-3817 (Dalene Burgun) and Appeal No. 81-3127 (William Lee). Thus, although the juries were told that they were to find "sexual conduct specifically defined by state law," they were given no such specific definitions in four of six cases. Appeal No. 80-3743 (Turoso I); Appeal No. 80-3742 (Turoso II); Appeal No. 80-3796 (Turoso III); Appeal No. 80-3728 (Laura Spiker).

II.

A certain amount of obfuscation, in our opinion unnecessary, has arisen, but this is due neither to the statute itself nor to the language of *Burgun* as contained in its syllabus. Rather, confusion arises from the body of the opinion in *Burgun* and from the jury instructions, which were impliedly approved by the affirmances of the appeals involved in *Burgun*.[5] There appears to have been a tendency in the jury instructions, both in the underlying state criminal trials here

[5] The rule in Ohio is that the precedent in each case is to be found in the syllabus rather than in the text of the opinion. This rule has existed in some form for over 100 years. Rule VI, *Ohio S. Ct. Rule of Practice* provides:

> A syllabus of the points decided by the Court, in each cause, shall be stated in writing by the Judge assigned to prepare the opinion of the Court, which shall be confined to the points of law arising from the facts of the cause that have been determined by the Court.

94 Ohio St. ix (1916). Following citation of the rule, the Reporter for the Court indicated:

> On page iii of 6 Ohio State the reporter made the announce-

and in *Burgun*, to focus on the definition of "obscene" in subsection (F), without mention of the definition of "sexual conduct" in subsection (A). Indeed, the instructions to the jury in appeal No. 80-3742 (Turoso II) expressly refer to the "sexual conduct" requirement of the *Miller* guidelines as being that which the trial judge had just read from subsection (F). This misplaced emphasis could engender confusion. Those federal district judges who granted habeas relief could well have considered those instructions as an indication that the Ohio statute remained vague and overbroad, despite the Ohio Supreme Court's alleged attempt to "authoritatively construe" it in a manner consistent with *Miller*.

Petitioners argue that the statute is vague and overbroad because of, rather than despite, the many specific definitions in the statute. The definition of "sexual conduct" in section 2907.01(A), *see ante* at 6, is only the first of many definitions included in section 2907.01. The others are:

> (B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is

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nent, under date of August, 1857, but not as a rule adopted by the court:

> "The Judges desire it to be understood that their concurrence in the opinion of the judge who announces the decision of the Court is limited to that part which was necessary for the determination of the case upon the facts, and the points of law arising therefrom; and, in general, the judges have endeavored to state those points in the syllabus of each case."

In the same announcement it is stated that volume 6 Ohio State reports was published before volume 5.
In volume 5, beginning on page iii, certain rules of court were adopted by the "Judges of the Supreme Court, *in the month of January, 1858*, pursuant to the provisions of the 601st section of the Code of Civil Procedure," included in which rules is the present Rule VI, that the syllabus states the points of law decided.

We thus refer to the syllabus of the opinion rather than its body in evaluating the Ohio Supreme Court's construction of the obscenity statute. For an interesting discussion of the syllabus rule, see *The True S ry of the Ohio Syllabus Rule*, [1980] Y.B. 21 (Supreme Ct. Historical Soc'y).

a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity which tends to glorify or glamorize such activity, and which with respect to juveniles has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults [sic]. Or, if it is designed for sexual deviates or other specially susceptible group,

judged with reference to such group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by display or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

The heart of petitioners' argument is that, when obscenity is defined only with reference to subsection (F), the statute is capable of an unconstitutional application. For example, they claim the statute, as "authoritatively construed" would permit prosecutions for simple nudity,[6] as coming within the definition of obscene matter under subsection (F)(2), or it would permit prosecution for depicting "extreme or bizarre violence" under subsection (F)(5), neither of which alone complies with the restrictions in *Miller*. Petitioners assert that, because the five subsections of subsection (F) are written in the disjunctive, there is no tie-in with the other subsubsections. Thus, a jury instructed in the way condoned in *Burgun* could find that the defendants were guilty as charged, even though it might not have believed that the material or performance involved met the tests of *Miller*.[7]

These claims have superficial appeal. However, it is unreasonable to consider only discrete sections of the statute in

[6] This fear is exaggerated. The Ohio courts have recognized that nudity *per se* is not obscene. *See, e.g.*, *City of Cincinnati* v. *Walton*, 76 Ohio Law Abs. 162, 3 Ohio Ops. 2d 252, 145 N.E.2d 407 (1957); *State of Ohio* v. *Lerner*, 51 Ohio Law Abs. 321, 81 N.E. 282 (Hamilton County Common Pleas 1948).

[7] Alternatively, a jury discerning from the instructions that nudity is "sexual conduct" could find that the *Miller* test is satisfied if it views nudity as patently offensive and without redeeming value.

order to determine its validity. The statute must be read in its entirety and, as the Ohio Supreme Court so obviously intended, in *pari materia* with *Miller*.[8] Such a reading discloses that subsection (F) is but one of several requirements necessary to sustain a conviction. In addition to meeting one or more of the five requirements of section 2907.01(F), material must also depict or describe sexual conduct, contact, or activity within the meaning of section 2907.01(A)-(C).

Alternatively, the material at issue must both satisfy one or more of the definitions of section (F) and comport with one of the *Miller* examples in order to satisfy *Miller*. Although no jury in the underlying state criminal proceedings here was advised that specific sexual conduct included the *Miller* examples, the Supreme Court of Ohio appears to have construed the former and nearly identical obscenity statute to

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[8] In our view, Judge Merritt's dissent completely misses the point of the majority decision here, in *Sovereign News* v. *Falke*, *supra*, and in the Ohio Supreme Court's decision in *Burgun*. That is, of course, that the First Amendment continues to protect expression in Ohio unless it falls within the permissible limits of *Miller* v. *California*. Judge Merritt's unhappiness, therefore, is of necessity with *Miller*. It has to be manifestly clear that whatever "conduct" the Ohio statute proscribes must perforce come within *Miller* or it is protected.

Judge Merritt's speculations concerning the fate of great works of art in Europe, under Ohio's statute are therefore without basis. Meanwhile, back in the Cleveland Municipal Court, the battle bears faint resemblance to that fought in the dissent. According to the evidence in *Turoso I*, for example, the following is part of an unchallenged description of an 8 mm. film which incurred the charges and brought about the conviction complained of in that appeal:

> [P]articipants are two males and two females. One of the females is committing fellatio on the two males at the same time. [The movie] then shows the two males jacking off and the female lying down in front of them licking her lips. After a time one of the males ejaculates into her mouth and on the chin. The other female then licks the chin and kisses the above mentioned female. She then commits fellatio on the male that hasn't ejaculated yet. While she is doing this the other males and female and [sic] playing with her vagina. The female then commits cunnilingus on her. Then the other male ejaculates into the mouth of the female. The two females then kiss and embrace again.
>
> Appeal No. 80-3743 (Turoso I), Joint Appendix at 22.

encompass the *Miller* examples. *See State ex rel Keating* v. *Vixen*, 35 Ohio St.2d 215, 301 N.E.2d 880 (1973).[9] Moreover, the published order of affirmance by our court in *Sovereign News, supra*, recognizes that those examples were adopted by reference in *Burgun*, a conclusion reached as well by Judge Thomas in his opinion in appeal No. 80-3696 (Turoso III).

As a result, a potential defendant has definite standards by which he can evaluate any material at issue. For example, one who finds himself charged with pandering obscenity by selling obscene material will first read section 2907.32(A)(2) for the essential elements of the offense. He can then refer to section 2907.01 for a definition of "obscene," or of any other term with a specific meaning under the statute. Knowing also that the Ohio Supreme Court has construed the statute as incorporating the guidelines of *Miller* v. *California*, he will know its three requirements must be proved *in addition* to the elements of obscenity listed in section 2907.01(F). Therefore, under the statute "as written and authoritatively

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[9] The former statute provided that:

(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

Section 2905.34(A) Ohio Rev. Code (1970) (current version at section 2907.01(F) Ohio Rev. Code (1974)).

construed," it is incumbent upon the prosecution to prove beyond a reasonable doubt that:

(a) The material depicts conduct which is sexual; that is, it depicts vaginal intercourse or any of the other explicit examples expressly set forth in the definition of sexual conduct in section 2907.01(A), or one of the two examples of such conduct as described in *Miller;*

(b) the sexual conduct depicted is obscene, as that term is expressly defined in section 2907.01(F)(1)-(5); *and*

(c) the material meets the three guidelines of *Miller,* in that (1) when taken as a whole and applying contemporary community standards, it appeals to the prurient interests of the average person; (2) it depicts or describes, in a patently offensive way, the sexual conduct specifically defined in section 2907.01(A) or in the examples of *Miller*; and (3) taken as a whole, it lacks serious literary, artistic, political, or scientific value.

The foregoing seems to us the most logical, natural and also literal construction of the Ohio statute, construed *in pari materia* with *Miller.* It is true that, taken alone, certain of the disjunctive definitions of "obscene" in section 2907.01(F) may appear to apply only to protected activity, such as simple nudity and violence. Similarly, it is possible that a reading of both *Miller* and the statute creates redundancies and surplusage. This result can be avoided in each particular case with careful jury instructions. More important, it is not for our court to determine that a better statute could be devised. Rather, it is our function to follow the Supreme Court's finding that state statutes dealing with obscenity can be upheld where their authoritative judicial construction has made them conform to *Miller. Miller, supra,* 413 U.S. at 24, n.8, 25; *Ward* v. *Illinois,* 431 U.S. 767 (1977). Defendants can deter-

mine that the material must depict explicit sexual conduct as defined in the statute, that the sexual conduct must also meet one or more of the definitions of "obscene" in the Ohio statute, and that all three of the *Miller* guidelines must be met in order to convict him. Thus, there can be no prosecution for simple nudity, nor for violence or bizarre conduct alone. As a result, there can be no claim of overbreadth on that account, nor is the statute vague as leaving uncertainty.

III.

As we have mentioned earlier, the instructions given in the underlying criminal prosecutions in the Cleveland Municipal Court varied in their form from that outlined above. All included a reading of the entire definition of "obscene" contained in section 2907.01(F); however, only two included a reading of the definition of "sexual conduct" contained in section 2907.01(A). None included the *Miller* examples.

In no case is it claimed that the particular material or performance did not, in fact, depict sexual conduct specifically included in the statutory definition. In fact, there is no claim that such an instruction (or indeed any other definition which the particular case might appear to make desirable) was requested and refused. It is obvious to us that if a jury is advised that material must depict sexual conduct "specifically defined by applicable state law," good sense suggests that the specific definition be given. It is also apparent that if confusion existed, it was wholly avoidable by a straightforward application of the statute and of *Miller*. If such confusion had been seen as prejudicial by the defendants in the criminal proceedings, it could easily have been corrected or could have been made the subject of appropriate objection on appeal within the state system. It seems equally clear to us, from the graphic descriptions of the material involved, that these cases concern what is commonly known as hard core pornographical material. It so obviously fits within the appropriate

definitions of "obscene materials" that any further or more explicit definitions could only have reinforced the likelihood of conviction. It is thus difficult to believe that any failure to object or to raise such issues before us was an oversight. Obviously, the petitioners here have realized that their best, and probably only effective, defense lay in persuading the courts that the statute was altoghether void. Anything short of that finding would at best lead to a grant of a conditional writ, retrial under even less favorable but completely lawful instructions, and, once more, convictions.

In his written opinion filed in the appeal of Frank Turoso, Appeal No. 80-3696 (Turoso III), United States District Judge William K. Thomas noted that the jury instruction involved therein included neither the *Miller* "examples" nor the definition of "sexual conduct" of section 2907.01(A). *Turoso, supra,* C79-1010 at 21. Judge Thomas' observations explain both the nature of the problems in these appeals and the reason why they do not reach constitutional proportions. He indicates further that omissions in the jury instructions do not require holding the entire statute unconstitutional, the sole legal ruling sought here:

> In his recommended report, the magistrate noted that the court (Judge Calandara) did not define sexual conduct in terms of the two examples in *Miller*, at p.25, nor did the court define sexual conduct as it appears in Ohio Revised Code § 2907.01(A). The magistrate then concluded:
>
> > Since the court instructions did not define the sexual conduct to be restricted with the requisite specificity, the instructions were unconstitutionally overbroad. *Sovereign News Co., supra,* at p. 400.
>
> Thereupon he recommended that the petition for a writ of habeas corpus be granted.
>
> Immediately before Judge Calandra gave his general instructions to the jury, he informed defense counsel that

he would "charge the jury on the *Miller* case and the *Smith* case and the *Burgen (sic)* case." As the quoted portions of Judge Calandra's instructions indicate, he gave the jury the *Miller* guidelines. Following the completion of the general instructions, there was a discussion at the bench about several matters. At that time, defense counsel did not ask the judge to add the *Miller* "examples" to the court's instructions on the *Miller* guidelines. Thus defendant did not ask the court to give to the jury the *Miller* "examples." Moreover, defendant did not object to the giving of the *Miller* guidelines without the *Miller* "examples."

In *Henderson* v. *Kibbe*, 431 U.S. 145, 154-55, (1977), the Court reversed a decision of the Second Circuit wherein a divided panel had granted a state prisoner's petition for habeas corpus on the ground that a New York state trial judge's failure to instruct the jury on the issue of asportation was constitutional error. The Court observed:

> Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.

The Court further noted that "an omission or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." The Court announced the rule that is controlling here:

> The burden of demonstrating that an erroneous instructing was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected

> the entire trial that the resulting conviction violates due process," *Cupp* v. *Naughten*, 414 U.S. at 147, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned'."

Id., at 146.

> This controlling rule of federal habeas corpus law differs from the magistrate's recommended ruling, isolating, as he did, the judge's instructions from the rest of the trial and determining that the court's instructions were unconstitutionally incomplete. However, the question in this federal habeas corpus proceeding is not whether Judge Calandra's instruction to the jury, *sans* a definition of "sexual conduct" in terms of the two examples in *Miller*, at p.25, nor ". . . as it appears in O.R.C. 2907.01 (A)," rendered the "instructions . . . unconstitutionally overbroad." The question rather is whether the instruction without such definition of sexual conduct "so infected the entire trial that the resulting conviction violates due process."

Id. at 21-23.

The foregoing comments apply with equal force to each of the appeals consolidated here, and no effort is made by the parties to assert any meaningful distinction between them individually. There is no evidence in petitioners' briefs or the records below that any trial was so tainted by a failure to instruct properly that due process was violated. Thus, habeas relief is unwarranted. *See Long* v. *Smith, Superintendent*, 80-3057 at 10-11 (6th Cir. October 21, 1981).

IV.

The Ohio Supreme Court has authoritatively construed the statute to comport with the *Miller* requirements. It has thus made clear its commitment to the protection of First Amendment expression. Petitioners assert that the court's authoritative construction" of the obscenity statute falls short of meet-

ing the *Miller* standards, offering as evidence both the implicit approval of potentially defective jury instructions in *Burgun, supra,* and the alleged insensitivity to the *Miller* requirements in *State ex rel Keating* v. *Vixen,* 35 Ohio St.2d 215, 301 N.E.2d 880 (1973).

It is sufficient for us to observe in closing what was recognized in *Miller*:

> If a state law that regulates obscene material is [limited to conform with *Miller* requirements], as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of Constitutional claims when necessary.

Miller, supra, 413 U.S. at 25. Although we may agree with the dissent that the language in *Vixen, supra,* is disturbing, that case is obviously not before us here. We have never conceived that a federal court's responsibility to protect freedom of expression under the First Amendment is discharged by mere lip service to any rule, however artfully crafted.

The judgments in appeals No. 80-3696 and 80-3817 are affirmed. The judgments in appeals No. 80-3743, 80-3742, 81-3127 and 80-3728 are reversed.

MERRITT, Circuit Judge, dissenting. I agree with District Judges Manos and Aldrich that the Ohio obscenity statute is unconstitutional. Our Court treats this as just another criminal statutory construction case and tries to perform radical surgery on the statute in order to save it and the state convictions based on it. But this is a statute outlawing speech and artistic expression; it requires a more sensitive reading of the First Amendment than our Court has given. Unlike the relatively healthy state statute saved in *Ward* v. *Illinois* by insertion of a *Miller* pacemaker, the heart of the Ohio statute in question here is malignant. A *Miller* pacemaker will not regulate it. If our Court's opinion stands as the law of obscenity, then all state obscenity statutes will be upheld as valid, no matter how broadly or specifically they censor protected speech, so long as the *Miller* standards are repeated to the jurors after they are instructed to apply the unconstitutional statute.

The Illinois statute in *Ward* was a general, single-shot provision outlawing material when "its predominant appeal is to prurient interest." The Ohio statute has more than thirty specific sections and subsections that cover the waterfront. The heart of the statute is section E with seven subsections and section F with five. Section E, relating to juvenile material, covers everything from "bizarre violence," "foul language," "physical torture" and "death" to "nudity" and "sexual excitement." Under Section F, and the jury instructions approved by our Court today, a defendant can be convicted of pandering adult obscenity and go to jail, for displaying or depicting "[1] sexual excitement or [2] nudity in a way which tends to represent human beings as mere objects of sexual appetite . . . [or 3] bestiality or [4] extreme or bizarre violence, cruelty or brutality . . . or [5] depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities . . . ." Ohio Rev. Code § 2907.01(F). "Bestiality" and other similar ideas are not

defined but obscene "nudity" consists of "showing . . . [1] male or female genitals, [2] pubic area, or [3] buttocks with less than a full, opaque covering or, [4] of a female breast with less than a full opaque covering of any portion thereof below the top of the nipple . . . ." Ohio Rev. Code § 2907.01(H). These provisions are the heart of the statute.

Under the statutory scheme and jury instructions approved by us today, Phidias and Praxiteles would be condemned not to a cup of hemlock, along with Socrates, but to languish in an Ohio jail along with the creators of most Greek statues of Aphrodite, Hermes, Apollo and the Satyrs. For these sculptors "displayed" genitals, buttocks and female breasts "below the top of the nipple" "with less than a full, opaque covering." The Parthenon frieze of Phidias has for over 2500 years withstood wind and storm and bombings and invasions by Persians, Spartans, Romans, Ottoman Turks and German artillery, but its marble nudity and magnificent depiction of "bizarre violence" could not withstand the onslaught of the righteous of Ohio. Michelangelo's ceiling twenty centuries later in the Sistine Chapel would now have to come down for the larger-than-life genitals and buttocks of Adam are clearly "displayed" as God reaches out his finger to instill life in the first man. The creation could not have taken place in Ohio.

Moreover, since relieving oneself of body fluid is also "obscene" in Ohio, the creator of the famous sculpture of the little boy in Brussels, who performs for all to see function #1 in a pond, would unfortunately have to go to jail, and the little boy of bronze, in order to escape the sledge hammer of the godly, would have to place over his genital region not merely a fig leaf but nothing less than a "full opaque covering." The Pope would even have to remove from Ohio the Vatican Museum with its many fearsome statues, friezes and pictures showing "bestial" and "bizarre" battles of an extremely violent nature between animals and animal-like humans.

If you believe that all this is a dissenter's exaggeration and that the authorities in Ohio would not really countenance under this statute the suppression of such works of art, I admonish you to read *State of Ohio ex rel. Keating* v. *"Vixen,"* 35 Ohio St.2d 215, 301 N.E.2d 880 (1973), the response of the Ohio Supreme Court to the action of the United States Supreme Court, 413 U.S. 905 (1973), vacating the state court's earlier decision in 27 Ohio St.2d 278 (1971), in light of *Miller*. The state court, purporting to apply post-*Miller* standards, finds the film in question obscene under the statute after describing it as follows:

> The principal character, Vixen, is a buxom young wife, whose 'square' husband is a combination pilot and fishing guide in the wilderness of British Columbia. His work keeps him away from their home for extended periods of time. Among the other characters are Vixen's motorcycle hood brother, a Canadian Mountie, with whom Vixen passes the first few minutes of the film, a vacationing couple who are guest-clients of the husband, a black American whom Vixen despises and who has fled the country to avoid the draft, and an Irish communist who attempts at gun-point to force Vixen's husband to fly him to Cuba. The first four are objects of Vixen's lechery.
>
> The movie is approximately 70 minutes long, out of which approximately one-half deals with incest, adultery, and lesbianism, which are graphically portrayed through facial and bodily expressions indicative of orgasmic reaction. The remaining one-half of the movie leads the viewer through such contemporary issues as racism, anti-militarism, communism and airplane hijacking. *It should be noted that, although the players are frequently shown nude and at full length, at no place are their genital parts exposed to the leering lens of the camera.* (Emphasis added.)

272 N.E.2d at 139. Although this movie may not be a work

of art, it is far from hard core pornography.[1] On the next page of the opinion, the Ohio Supreme Court explains that just one sex scene would make even "The Sound of Music" obscene and subject to prior injunctive restraint:

> Assume, hypothetically that the main character in 'The Sound of Music' performs during one scene, an act of sexual lewdness, could we permit that part of the film to go unregulated merely because the producer had an 'eye on the recent Supreme Court rulings?' The question supplies its own answer.

In the end, however, the situation is not touched with much humor. Books are being confiscated and people going to jail for speech under a statutory scheme that clearly and patently contravenes the First Amendment. As District Judges Manos and Aldrich state so cogently, all the Supreme Court of Ohio has done is simply add the *Miller* standards as a new, alternative method of sending people to prison while leaving in effect alongside it the old unconstitutional method outlawing graphic expression of "sexual excitement," "nudity," "bizarre violence" and "human bodily functions." It is impossible to tell in these cases whether the jury convicted and the Ohio courts imprisoned the defendants because they violated the old unconstitutional statutory provisions or the new *Miller* standards. The juries in these cases were given all of the alternatives in the disjunctive and were not required to state which of the several standards they applied.

Our system of criminal justice cannot live with the underlying principle enunciated today in this case by our Court: a man's conviction for speech is valid under a patently unconstitutional law so long as the state could, theoretically, have repealed the old law and drafted another, more narrow,

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[1] In *Miller*, the court said: "Under the holdings announced today, no one will be subject to prosecution for . . . obscene materials unless these materials depict or describe patently offensive 'hardcore' sexual conduct specifically defined . . . ." 413 U.S. at 27.

valid statute that proscribes the same speech. Our system cannot live with this principle because it violates due process and creates the offense ex post facto. The opinion of the court also violates principles of federalism. We have the authority to review and declare invalid state laws which abridge the First Amendment, but we are not authorized to repeal their statutes and reenact them to suit ourselves. And even more to the point, if we are going to presume to enact new laws for the states rather than simply review judicially the ones they have, we should at least enact valid laws for them. The one we have pieced together here still outlaws nudity, bizarre violence, foul language, torture, death and the "glorification" of sex and many other materials protected by the First Amendment. It violates the basic principle laid down in *Cohen* v. *California*, 403 U.S. 15, 26 (1971) that the First Amendment protects the "emotive function" as well as "cognitive content" and the principle that First Amendment protection of artistic materials is "not lessened by the fact that they are designed to entertain as well as inform." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952).

OPINION OF THE DISTRICT COURT
IN HABEAS CASE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

FRANK TUROSO	)	C79-1010
	)	
Petitioner	)	[Entered Sept.
	)	15, 1980]
v.	)	
	)	
THE CLEVELAND	)	
MUNICIPAL COURT,	)	
et al.	)	

MEMORANDUM AND ORDER

THOMAS, J.

Challenging his conviction by a Cleveland Municipal Court jury for pandering obscenity (O.R.C. §2907.32(A)(2)) and his consequent sentence, Frank Turoso petitions this court for a writ of habeas corpus (28 U.S.C. §2254). Petitioner contends that he was convicted and sentenced in violation of his First and Fourteenth Amendment rights. He says that O.R.C. §2907.32(A) and §2907.01 (which defines obscenity and therefore must be read with the former section)

are unconstitutionally vague and over-broad.

Convicted on April 29, 1977, Frank Turoso was sentenced to six months in jail and fined $1,000. The Ohio Court of Appeals (Eighth District) affirmed that conviction on April 26, 1979. Petitioner did not appeal his conviction to the Ohio Supreme Court. Instead, he filed his habeas corpus petition in this court.

Magistrate Streepy, to whom the case was referred for a report and recommended decision, concluded:

> It is arguable that [the R.C. 2907.01] definition of sexual conduct, considered in combination with the element of "patently offensive" in part (b) of the [Miller v. California, 413 U.S. 15 (1973)] guidelines, comes within the examples of "hardcore" sexual conduct set forth in Miller, at p. 25, which the state may constitutionally regulate.

Nevertheless, the magistrate recommended that the petition for a writ of habeas corpus be granted on the following ground:

> The court in petitioner's case did instruct the jury in the language of the three-part Miller standard; but did not specifically define "sexual conduct" in part (b) of the standard pursuant to the applicable state law. Thus the court did not define sexual conduct in terms of the two examples in Miller, at p. 25, nor did the court define sexual conduct as it appears in Ohio Revised Code §2907.01(A). Since the court instructions did not define the sexual conduct to be restricted with the requisite specificity, the instructions were unconstitutionally overbroad. Sovereign News Co., [448 F.Supp. 306, 400 (N.D. Ohio 1977, Manos, J.)]

The subjects of the two recommended rulings of the magistrate will be covered in the memorandum of this court. The first recommended ruling need not be discussed because this court hereafter concludes that the Ohio obscenity law is constitutional as construed by the Ohio Supreme Court in light of Miller v. California, 413 U.S. 15 (1973), and Ward v. Illinois, 431 U.S 767 (1977).

The second recommended ruling of the magistrate, not adopted by this court, will be discussed.

I.

A.

Two jurisdictional issues are raised by this habeas corpus petition. First, since the petitioner has not yet begun to serve the sentence of six months or pay the $1,000 fine imposed upon him, is he "in custody" within the meaning of 28 U.S.C. §2254? An entry in the case transcript reads:

> Mandate received from Court of Appeals. Judgement affirmed. Sentence stayed. Same bond. [$5,000 surety bond] pending resolution of habeas corpus in U.S. District Court.

Hensley v. Municipal Court, 411 U.S. 345 (1973), held that a person released on bond (personal recognizance in Hensley) is in "custody" within the meaning of

the federal habeas corpus statute, 28 U.S.C. §§2241(c)(3), 2254(a). But for the staying of the sentence by the state court, and his continued release on surety bond, the petitioner would be serving the Cleveland Municipal Court's sentence. Hence, under Hensley, he is "in custody."

However, Hensley emphasizes that a state defendant "released on bail or on his own recognizance pending trial or pending appeal...must still contend with the requirements of the exhaustion doctrine if he seeks habeas corpus relief in the federal courts." This raises a second jurisdictional question.

While 28 U.S.C. §2254(b), (c) provides that a petition for writ of habeas corpus by a person in state custody will not be granted unless state court remedies have been exhausted, Lucas v.

People of State of Michigan, 420 F.2d 259, 261 (6th Cir. 1970), recognizes that "the exhaustion requirement is not absolute." When a state court's rulings are settled and there is no reason to believe that a state's appellate courts are prepared to depart from those rulings, Lucas holds that "to require [a petitioner] to exhaust [the] remedies in the State courts would be an exercise in futility." Rachel v. Bordenkircher, 590 F.2d 200, 204 (6th Cir. 1978), approved and followed Lucas.

In State v. Thomas, 57 Ohio St. 2d 71, 387 N.E. 2d 229 (1979), a per curiam opinion, the Supreme Court of Ohio reviewed the Akron Municipal Court's dismissal of a pandering obscenity (R.C. 2907.32) charge. The dismissal had been affirmed by the Summit County Court of Appeals on the ground that R.C. 2907.32

and 2907.01(F) (defining obscenity) are "unconstitutionally overbroad and vague." In reversing the court of appeals "on the authority of and for the reasons stated in State v. Burgun, 56 Ohio St. 2d 354 (1978), 384 N.E.2d 255," the Ohio Supreme Court reaffirmed the ruling that R.C. 2907.01(F) "is neither unconstitutionally overbroad nor void for vagueness when it is authoritatively construed to incorporate the guidelines prescribed in Miller v. California, 413 U.S. 15 (1973), 93 S.Ct. 2607, 37 L.Ed. 419." Thus, to require petitioner to exhaust his remedies through the Ohio Supreme Court when its adjudication of constitutionality is predictable would be the "judicial runaround" which Lucas finds to be futile and unnecessary.

B.

Miller v. California formulated three "basic guidelines for the trier of fact,"

and the statement of these guidelines in the conjunctive requires each to be established:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, at 230, quoting Roth v. United States, supra, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious litarary, artistic, political, or scientific value.

Id., at 24.

Preliminary to the formulation of the guidelines, the Court had stated:

> We acknowledge...the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited...As a result, we now confine the permissbile scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.

Id., at 24.

The Court elaborated upon part (b) of the guidelines by giving examples of sexual conduct, the depictions of which could be defined and regulated by a state:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of genitals.

Id., at 25. The Court was careful to point out that "[w]e do not hold... that all States...must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate." Id., at 24, n. 6. Allowance was made, indeed permission was given, for state courts to "authoritatively construe" their obscenity statutes to bring those statutes into conformance with Miller.

The Court ruled:

> If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary (citations).

Id., at 25.

In Ward v. Illinois, 431 U.S. 767 (1977), the Court was faced with a pre-Miller statute. Ill.Rev.Stat. ch. 38, §11-20(b) thus defined obscenity: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters...." It was argued in Ward that the statute was unconstitutionally vague

because it failed to specifically define the sexual conduct which could not be "depicted in a patently offensive way."

The argument was rejected on several grounds. In cited decisions of the Illinois Supreme Court that predated the sales for which Ward was prosecuted, the Court noted that "[m]aterials such as [Ward sold], which by title or content may fairly be described as sado-masochistic, had been expressly held to violate the Illinois [obscenity] statute...." Id., at 771. Thus there was "notice that materials dealing with the kind of sexual conduct involved [in Ward] could not be legally sold in [Illinois]."

In a case remanded under Miller, People v. Ridens, 59 Ill. 2d 362, 321 N.E.2d 264, 270 (1974), the Illinois Supreme Court construed section 11-20 "to incorporate parts (a) and (b) of

the Miller standards." In Ridens, the court neither expressly adopted nor set forth the Miller "examples."

By the Illinois court's incorporating part (b) of the Miller guidelines into the Illinois statute, the Court reasoned that,

> The Illinois court thus must have been aware of the need for specificity and of the Miller Court's examples explaining the reach of part (b). See id., at 25.

Since the "Illinois court plainly intended to conform the Illinois law to part (b) of Miller," the Court concluded, "[T]here is no reason to doubt that, in incorporating the guideline as part of the law, the Illinois court intended as well to adopt the Miller examples, which gave substantive meaning to part (b) by indicated the kinds of materials within its reach." Ward, supra, at 775. The Court then added:

> The alternative reading of the decision would lead us to the untenable conclusion that the Illinois Supreme Court chose to create a fatal flaw in its statute by refusing to take cognizance of the specificity requirement set down in Miller.

Id., at 775. Thus, the Court held that the incorporation of part (b) of the Miller guidelines impliedly incorporated the Miller patently offensive "examples" into the Illinois obscenity law. However, these "specifics were offered merely as 'examples,'" 413 U.S. at 25; and as later pointed out in Hamling v. United States, 418 U.S. 87, 114 (1974), they "were not intended to be exhaustive."

The conclusions of the Court in Ward are no less an independent ground of decision because the Court thereafter found reinforcement for these conclusions in the later Illinois decision of People v. Gould, 60 Ill.2d 159, 324 N.E.2d 412

(1975). The Court noted that Gould quoted a passage from Miller which "contains the explanatory samples as well as the guidelines" and that Gould then stated that "Ridens had construed the Illinois statute to include parts (a) and (b) of the Miller guidelines, and it expressly referred to the standards set out in the immediately preceding quotation from Miller." The Court then held:

> Because the quotation contained not only part (b) but the examples given to explain that part, it would be a needlessly technical and wholly unwarranted reading of the Illinois opinions to conclude that the state court did not adopt these explanatory examples as well as the guidelines themselves.

431 U.S. at 775-76. The Court further held:

> Given that Illinois has adopted Miller's explanatory examples, what the State has done in attempting to bring its statute in conformity with Miller is surely as much as this Court did

> in its post-Miller construction of federal obscenity statutes. In Hamling v. United States, 418 U.S. at 114, we construed 18 U.S.C. §1461, which prohibits the mailing of obscene matter, to be limited to "the sort of" patently offensive representations or descriptions of that specific hardcore sexual conduct given as examples in Miller.

Id., at 776.

Hence, the question of meeting the constitutional statutory specificity requirement depends upon whether the Ohio statute, section 2907.01(F), has been authoritatively construed by the Ohio courts to incorporate the Miller three-part guidelines and if so, whether the incorporation of the Miller examples may be implied therefrom.

C.

O.R.C. 2907.01(F) thus defines "obscene":

> (F) When considered as a whole, and judged with reference to ordinary adults, or, if it is designed for sexual deviates

or other specially susceptible group, judged with reference to such group, any material or performance is "obscene"if any of the following apply:

(1) Its dominant appeal is to prurient interest:

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a

> dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

The petitioner has not filed any comment on the magistrate's recommended report. However, the petitioner argues in his written submission to the magistrate that the section 2907.01(F) definition of obscenity is unconstitutionally overbroad and vague because it does not comply with the standard articulated by the Supreme Court in Miller v. California, 413 U.S. 15 (1973). He argues that the statute is written in the disjunctive rather than the conjunctive, allowing for prosecution upon the finding of any one of the five characteristics listed within section 2907.01 (F). He further argues that depictions

proscribed by section 2907.01(F) include violence and mere nudity, both of which are protected.[1] Finally, petitioner claimed that the statute does not define with the requisite specificity the sexual conduct which may not be depicted because it is patently offensive.

Respondents Cleveland Municipal Court and the Honorable Salvatore R. Calandra have filed objections to the report of the magistrate. In sum, they argue that the Ohio Supreme Court has construed the Ohio obscenity law to incorporate the Miller guidelines and that necessarily the incorporation includes the Miller examples of patently offensive sexual conduct. Since such incorporation was presumed by the United States Supreme Court in upholding the Illinois obscenity

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[1] In Jenkins v. Georgia, 418 U.S. 153, 161 (1973), the Court stated, "[N]udity alone is not enough to make material legally obscene under the Miller standards."

law in Ward v. Illinois, 431 U.S. 767 (1977), the same presumption of incorporation of the Miller "examples" sustains the Ohio obscenity law against petitioner's attack, it is urged.

In State v. Burgun, 56 Ohio St 2d 354, 384 N.E.2d 255, (1978), the Ohio Supreme Court had before it appeals of four persons, each convicted by a jury in Cleveland Municipal Court of pandering obscenity in violation of O.R.C. 2907.32 (A)(4).[2] The defendants were cashiers or clerks in adult bookstores located in Cleveland. In each situation police

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[2] O.R.C. 2907.32(A)(4), in pertinent part provides:

(A) No persons with knowledge of the character of the material or performance involved, shall do any of the following:

****

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged....

viewed movies in coin operated projectors located in booths at the rear of the premises. Later, pursuant to search warrants, the movies were seized, admitted into evidence, and viewed by the jury.

Each appellant charged that the definition of obscenity, which must be read together with R.C. 2907.32(A)(4), is

> overbroad "on its face" because an item can be considered "obscene" if any of the characteristics outlined in subsections (1) through (5) are present. [Supra, at p.9] Since the statute is written in disjunctive rather than conjunctive language, it is alleged that a conviction can be obtained without a finding that the tripartite test in Miller v. California (1973), 413 U.S. 15, has been satisfied.[3]

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[3] At p. 358, the court extends appellants' criticism of section 2907.01(F):

> In addition to the criticism that subsections (1) through (5) do not facially incorporate the three-part Miller test, the appellants have asserted other instances where the statute

The Burgun court's familiarity with the Miller guidelines is revealed in its

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3 cont.
conflicts with that decision. It is argued that subsection (3) unconstitutionally restricts the depiction of extreme violence when only material depicting or describing sexual conduct may be limited as being obscene. In addition, appellants argue that subsections (1), (2), (3), and (5) are facially overbroad because acts of "'simple nudity'" as opposed to hard core pornography can also be considered to be "'obscene'." Likewise, what is meant by material whose "'dominant appeal is to prurient interest'" is cited as a further example of unconstitutional overbreadth. Finally it is argued that the general lack of specificity found in R.C. 2907.01(F) warrants not only a finding of unconstitutional overbreadth but also a determination that the entire statute is void for vagueness.

In Sovereign News Company v. Falke, 448 F.Supp. 306, 400 (N.D. Ohio 1977, Manos, J.), the court found that in four separate instances, "section 2907.01 defines 'obscenity' in a manner that restricts constitutionally protected expression." These instances are the same as the foregoing challenges to section 2907.01 (F).

quotation of those guidelines. The court's familiarity with the Miller "examples" must be inferred also from the fact that the court refers to p. 25 of the Miller opinion (on which page the Miller "examples" are set forth). The court stated:

> In that case, the United States Supreme Court, at pp. 24-25, described the permissible scope of state regulation of obscenity and the three-prong inquiry to be adopted by the trier of fact as follows: [guidelines thereupon quoted].

56 Ohio St. 2d at 357-58, 384 N.E.2d at 259. As prologue to the court's statement of its intention to read the Miller guidelines in pari materia with section 2907.01(F), the court next stated:

> In summary, appellants allege in effect that the statute not only has not been "limited, as written," in light of the Miller guidelines but also is incapable of a "narrowing construction" in conformity with that decision. We disagree.

> The United States Supreme Court did not intend for every state legislature to rewrite its obscenity statutes as a result of the Miller decision. As indicated, an "authoritative construction of applicable state law limiting the regulation of obscenity by the guidelines in that decision would be constitutionally sufficient."

Id., at 358, 384 N.E.2d at 259.

The Ohio Supreme Court then noted that following the Miller mandate it "was faced with a construction of the predecessors to the statutes under attack in the present case, R.C. 2905.34 and 2905.35,[4] immediately following the Miller decision in State, ex rel.

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[4] Effective January 1, 1974, Ohio adopted a new criminal code including a rewriting of its obscenity laws. The predecessor section O.R.C. 2905.34(A) was substantially readopted, but one subparagraph, as O.R.C. 2907.01(F), was added. Thus for present purposes, the predecessor definition of obscenity, O.R.C. 2905.34, and the present definition of obscentiy, O.R.C. 2907.01(F), have substantially the same wording. Both are written in disjunctive rather than conjunctive language.

Sensenbrenner, v. The Book Store, (1973), 35 Ohio St. 2d 220, and State, ex rel. Keating, v. Vixen, (1973), 35 Ohio St. 2d 215." Reviewing those decisions, the court observed that in Vixen at p. 219 it had held "that the statutory definitions 'comport with the standards enunciated in Miller'" and that similar language was found in Sensenbrenner at p. 221 where it indicated:

> It is apparent that, if these causes were remanded to the Court of Common Pleas, the trier of the facts, given the standards expressed in Miller and the provisions of R.C. 2905.34 as guides for determining the issue of obscenity, could come to no other conclusion than the one reached in the first instance.

Id., at 358, 384 N.E.2d at 260.

Continuing, the court observed that "[t]he application of the Miller guidelines to Ohio's obscenity law was also noted by this court in State, ex rel. Ewing, v. Without a Stitch (1974), 37

Ohio St. 2d 95." The court then held:

> The essence of these three Ohio decisions was not that the wording of R.C. 2905.34(A)(1) through (4) visibly, literally, or facially incorporated the tripartite Miller test in each of those subsections. What this court attempted to spell out was that the wording of the entire statute, when construed in pari materia with the Miller decision, adequately protected the First Amendment values applicable to the states through the Fourteenth Amendment. R.C. 2905.34 contains the same disjunctive language currently under attack as well as being more general in its terms and definitions than its successor, R.C. 2907.01(F).

Id., at 360, 384 N.E.2d at 260. Citing Ward v. Illinois, 431 U.S. 767 (1977), the Ohio Supreme Court correctly characterized that case as a reinforcement of the United States Supreme Court policy "of upholding facially overbroad state obscenity statutes that have been 'narrowed' by an 'authoritative construction' in light of the Miller guidelines."

Before considering whether Ohio has incorporated the Miller guidelines in

accordance with Ward v. Illinois, an earlier aspect of the Ward decision is pertinent here and should be mentioned. Ward v. Illinois noted that by virtue of earlier Illinois Supreme Court decisions "appellant had ample guidance from the Illinois Supreme Court that his conduct did not conform to the Illinois law." Id., at 771. Although the reference was to movies rather than magazines (a distinction without a difference), in State, ex rel. Keating, v. Vixen, 27 Ohio St. 2d 278, 285, 272 N.E.2d 137, 141-142 (1971) (Vixen I), the Ohio Supreme Court announced:

> Doubt can no longer remain that the depiction of purported acts of sexual intercourse on the movie screen and the public exhibition thereof "for commercial exploitation rather than for a genuine, scientific, educational, sociological, moral, or artistic purpose" is forbidden by Ohio law.

On remand by the Supreme Court of the United States of the same case for further

consideration in light of Miller v. California, the court in State, ex rel. Keating, v. "Vixen", 35 Ohio St. 2d 215, 218, 301 N.E.2d 880, 882 (1973) (Vixen II), repeated and approved the last quoted statement.

With express notice that "depiction of purported acts of sexual intercourse on the movie screen and the public exhibition thereof...is forbidden by Ohio law," and given the content of the magazine "Sexual Fantasies," described infra in part II, petitioner Turoso had full and direct notice that the commercial exploitation of the depictions of sexual acts contained in such magazines is likewise "forbidden by Ohio law."

To return to the matter of the incorporation of the Miller guidelines in the Ohio obscenity law, the Ohio Supreme Court noted what happened in Ward v. Illinois:

> The United States Supreme Court pointed out that subsequent to the Miller decision, Illinois Supreme Court decisions had proceeded to "construe" section 11-20 of their Criminal Code to "incorporate" the guidelines in that decision. Id., at 774-75. As a result of that state Supreme Court's "response to Miller," the court indicated, at p. 776 that it would not hold the Illinois statute to be "unconstitutionally overbroad."

Id., at 361, 384 N.E.2d at 260-61. After observing that it had followed "a somewhat similar 'response to Miller' in its construction of R.C. 2905.34" in Vixen and Sensenbrenner, the court stated, "Today, that 'response' continues with a further clarification by the interpretation and application of its successor, R.C. 2907.01(F)." The Ohio Supreme Court then held:

> R.C. 2907.01(F) is neither unconstitutionally overbroad nor void for vagueness when it is read in pari materia with the Miller decision. The Miller test for defining obscenity is therefore incorporated into that statute by an "authoritative" state

> court construction specifically sanctioned by Miller. In addition, a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited. Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted parameters, the appellants' proposition of law has no merit.

Id. at 361, 384 N.E.2d at 261.

Thus it is seen that the Ohio Supreme Court has incorporated the Miller guidelines into O.R.C. 2907.01(F) "by an 'authoritative' state court construction." As seen earlier, in State v. Thomas, the Ohio Supreme Court reaffirmed its Burgun ruling which incorporated the Miller guidelines in O.R.C. 2907.01(F).

In State v. Vixen, (Vixen II), the opinion of the Ohio Supreme Court quoted the Miller "examples" as well as the Miller guidelines. Burgun approved State v. Vixen. Further, the Ohio Supreme

Court demonstrated its acquaintanceship with the Miller "examples" by its reference to p. 25 of Miller containing these examples. Applying the teachings of Ward v. Illinois, it is concluded that by expressly incorporating the Miller guidelines into O.R.C. 2907.01(F) with full knowledge of the Miller "examples," the Ohio Supreme Court has impliedly incorporated the Miller "examples" as well.

In Sovereign News Co. v. Falke, supra, Judge Manos declared O.R.C. 2907.01 and 2907.32 "unconstitutionally overbraod on their face;" he further declared O.R.C. 2907.01(F) "unconstitutionally vague." Thereafter, the court of appeals remanded the consolidated cases "to the district court for further consideration in the light of the decision of the Supreme Court of Ohio in State of Ohio v.

Burgun." Sovereign News Company v. Corrigan, 610 F.2d 428 (6th Cir. 1978). Without reference to what Judge Manos may decide on such remand, this court has the independent responsibility to decide the instant habeas corpus petition in light of the applicable and controlling law including Burgun, Miller, and Ward v. Illinois.

Judge Manos concluded that "[o]n the question of whether an Ohio court can put an authoritative gloss on §2907.01 thereby making it constitutional, the court finds that this cannot be done 'readily'." 448 F.Supp. at 404. He further concluded:

> Section 2907.01 does not lend itself to a narrowing construction. The statute is so substantially overbroad that only radical surgery could save it.
>
> ****
>
> To restructure Ohio Revised Code §2907.01 into a conjunctive

> statute in order to satisfy the Miller test, when it is a disjunctive statute on its face, would require strained reasoning by an Ohio Court.

Id., at 405. The incorporation of the Miller guidelines into O.R.C. 2907.01(F) by Burgun requires that the three parts of the guidelines be conjunctive, as in Miller, and that these three parts be proved in addition to one or more of the five sections of O.R.C. §2901.07(F). But in thus limiting Ohio's obscenity definition in accordance with Miller, it was not additionally necessary for the Ohio Supreme Court to impose a conjunctive construction upon the five subsections of O.R.C. 2907.01(F). While noting that O.R.C. 2907.01(F) should be "closely" read, the supreme court did not hold, and properly so, that it must be read conjunctively. Instead, it held that by the incorporation of the conjunctive

Miller guidelines "the current statutory definition has been effectively narrowed to constitutionally permitted parameters." 56 Ohio St. 2d at 361, 384 N.E.2d at 261.

Aware of the constitutional "parameters" of Miller, the Ohio Supreme Court has imposed the Miller limitations upon the Ohio statute, thus meeting the petitioner's assertions that O.R.C. 2907.01(F) is overbroad and vague. The implied incorporation of the Miller "examples" satisfies the constitutional requirements of specificity and notice. Thus authoritatively construed, O.R.C. 2907.01(F) is constitutional.

II.

Without designating the Ohio pandering obscenity statute (O.R.C. §2907.32(A)(2)) by section number, an omission which is presently unimportant, Judge Salvatore Calandra, in his jury instructions, told

the jury that the defendant was charged with the following "portion of the pandering obscenity statute:"

> I will read to you the statute that we were talking about and that we read when we first began the trial to refresh your memory. The defendant is charged with violation of the statute of pandering obscenity which reads as follows: - or that portion [with] which he is charged: "no person with knowledge of the character of the material or persons involved shall do any of the following: exhibit or advertise for sale or dissemination or sell or publicly disseminate or display any obscene material.

The court then stated:

> The elements of the crime, the essential elements of the crime, [are] knowledge of the character or the material, exhibit for sale, obscene material. I will read you the statute on the definition of obscenity in the State of Ohio. [The Judge then read the statute which is quoted, supra, at p.9.]

Continuing:

> These are the elements of the crime - knowledge of the content and character, exhibit for sale,

obscene material. You have a definition of obscene material. In addition, the Supreme Court of the United States has given basic guidelines to those who are the triers of the fact. In this case, you are the triers of the facts so in addition to the statutes which I have read to you, for you to find that the material which is in evidence, the magazine purchased, for you to find that material to be obscene, you must apply these guidelines; the definition of obscene which is stated in that statute; whether the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest; whether the works depict or describe in an offensive way sexual conduct specifically defined by the applicable state law; and whether the work taken as a whole lacks the serious literary, artistic, or scientific value. I won't repeat it, but I will just emphasize that I use the work "and" and not "or." All these must be present beyond a reasonable doubt before you can find that the material presented to you is legally obscene.[5]

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[5] Thus he told the jury that it must find that the magazine was obscene according to the statutory definition of obscenity but also that the

After Judge Calandra instructed the jury on other elements of the crime, he further charged the jury with reference to the definition of obscenity as follows:

> Further, the Supreme Court has stated that for you to determine that the magazine is legally obscene, you must see whether or not as a whole it appeals to the prurient interest. You must determine whether this feeling appeals to a prurient interest, for if it does not, it cannot be obscene. Prurient is p-r-u-r-i-e-n-t, because sometimes I don't pronounce it correctly. Now, let me see if I can define it for you. A magazine or a periodical does not appeal to a prurient interest just because it deals with sex. Prurient interest is an unhealthy, unwholesome

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5 cont.
three elements of the Miller guidelines - which he read - "all these must be present beyond a reasonable doubt before you can find that the material presented to you is legally obscene." Thus, while the jury need only have found present one or more of the five sections of O.R.C. 2907.01(F), the jury was required to find all three elements of the guidelines were present.

morbid, degrading and shameful interest in sex. An interest in sex is normal, but if the material appeals to an abnormal interest in sex, it can appeal to a prurient interest in your determination and one of the elements you must find. Also the Supreme Court has indicated that one of the guidelines is whether or not the material is patently offensive. In order to be legally obscene, the film must depict sexual conduct or - excuse me - the periodical must depict sexual conduct specifically defined by the state laws and depict in a patently offensive way. That's in a way that offends the contemporary community standards we have described above. You must find that the description of the sexual activity shown in the magazine goes substantially beyond customary limits and candor to determine whether or not it's patently offensive. The guidelines of the Supreme Court requires you to determine whether the magazine taken in its entirety, taken as a whole, lacks any serious literary, artistic, political or scientific value. I believe those words are sort of self-sufficient on themselves; and need no further clarification.

In the foregoing obscenity instructions, constituting all the court's instructions

on this subject, it is evident that the court did not read or refer to the Miller "examples."

In his recommended report, the magistrate noted that the court (Judge Calandra) did not define sexual conduct in terms of the two examples in Miller at p. 25, nor did the court define sexual conduct as it appears in Ohio Revised Code §2907.01(A). The magistrate then concluded:

> Since the court instructions did not define the sexual conduct to be restricted with the requisite specificity, the instructions were unconstitutionally overbroad. Sovereign News Co., supra, at p. 400.

Thereupon he recommended that the petition for a writ of habeas corpus be granted.

Immediately before Judge Calandra gave his general instructions to the jury, he informed defense counsel that he would

"charge the jury on the Miller case and the Smith case and the Burgun (sic) case." As the quoted portions of Judge Calandra's instructions indicated, he gave the jury the Miller guidelines. Following the completion of the general instructions, there was a discussion at the bench about several matters. At that time, defense counsel did not ask the judge to add the Miller "examples" to the court's instructions on the Miller guidelines. Thus defendant did not ask the court to give to the jury the Miller "examples." Moreover, defendant did not object to the giving of the Miller guidelines without the Miller "examples."

In Henderson v. Kibbe, 431 U.S. 145, 154-55, (1977), the Court reversed a decision of the Second Circuit wherein a divided panel had granted a state prisoner's petition for habeas corpus

on the ground that a New York state trial judge's failure to instruct the jury on the issue of causation was constitutional error. The Court observed:

> Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.

The Court further noted that "an omission or an incomplete instruction, is less likely to be prejudicial than a mis-statement of the law." The Court announced the rule that is controlling here:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error

> on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," Cupp v. Naughten, 414 U.S. at 147, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned'."

Id., at 146.

This controlling rule of federal habeas corpus law differs from the magistrate's recommended ruling, isolating, as he did, the judge's instructions from the rest of the trial and determining that the court's instructions were unconstitutionally incomplete. However, the question in this federal habeas corpus proceeding is not whether Judge Calandra's instruction to the jury, sans a definition of "sexual conduct" in terms of the two examples in Miller, at p. 25, nor "... as it appears in O.R.C. 2907.01(A)," rendered the "instructions...unconstitutionally overbroad." The question rather

is whether the instructions without such definition of sexual conduct "so infected the entire trial that the resulting conviction violates due process."

Turoso's pandering obscenity conviction rests primarily on his sale of the magazines "Sexual Fantasies Part I and Part II." In its cover pages, the magazine is described as "scientific, educational and sociological" and "dedicated to sexual knowledge of the mature adult." The text portion of the 63 pages of both Part I and Part II is typified by this excerpt:

> Again, let us clarify - everyone has, at one time or another, "bizarre" or exotic, even quite weird, sexual fantasies. One is tempted to think that such are abnormal, but quite the opposite is true. The total absence of such from one's conscious fantasy rather indicates excessive repression and is a sign therefore of emotional or mental disorder as opposed to sound health.

> But the fact that no such conscious fantasy occurs does not mean the mind is free of bizarre imaginings concerning sex. It merely indicates that such occur completely below the level of consciousness.

It is unnecessary to further appraise the text portions of the magazines. The jury was correctly instructed by the trial judge, in accordance with the first Miller guideline, to determine whether "the average person applying community standards would find that the magazine, taken as a whole, appeals to the prurient interest." But the trier of the facts, in carrying out this instruction, is met with the obvious structuring of the magazines. The text makes no reference to, and makes no attempt to, incorporate into the text the photographic depictions of explicit sexual conduct and activity which appear on each of the pages in both Part I and Part II.

Undoubtedly, it is these photographic depictions (88 in Part I and 104 in Part II) which are "dedicated to sexual knowledge of the mature adult." However, examination demonstrates that despite this purported purpose, these depictions are "sex...exploited without limit by... pictures exhibited or sold in places of public accomodation." Miller, at p. 25. The depictions display two or three persons of different sexes, or of the same sex, engaged in various sexual acts. In addition to so-called normal sexual copulation between male and female, there is masturbation, cunnilingus, fellatio, and anal intercourse, with the participants in twos or threes.

It is conclusively evident and it is determined that the photographic depictions of these sexual acts qualify as "plain examples of what a state statute

could define for regulation under part (b) of the standard announced in this opinion," Miller, supra, at 25. Each of the 192 photographic depictions of explicit sex both fall within either (a) or (b) or the Miller "examples":

> (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Also, the 192 depictions display "sexual conduct" as thus defined in section 2907.01(A):

> "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

The finding of guilty warrants the presumption that the jury found that each

of the three Miller guidelines was established by the evidence beyond a reasonable doubt. The evidence, highlighted here, fully supports those findings. It is not conceivable, nor does the record support the proposition, that the jury might have acquitted the defendant had Judge Calandra included the Miller "examples" in his instructions to the jury. Certainly the magistrate's opinion does not suggest that this might have been the verdict had the Miller "examples" been included in the judge's instructions to the jury.

Applying the Henderson v. Kibbe test, it is concluded and determined that the omission of the Miller "examples" from the judge's instructions to the jury in no manner "infected" the entire trial or produced the conviction. Therefore, the instructions, as given, did not violate

due process.

The habeas corpus petition of Frank Turoso is denied.

IT IS SO ORDERED.

/s/William K. Thomas
U.S. DISTRICT JUDGE

OPINION OF THE DISTRICT COURT
IN HABEAS CASE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LAURA SPIKER,	)	CASE NO. C79-704
	)	
Petitioner,	)	Judge John M. Manos
	)	
v.	)	
	)	
THE CLEVELAND MUNICIPAL COURT and THE HONORABLE SALVATORE CALANDRA and THE ATTORNEY GENERAL OF THE STATE OF OHIO, WILLIAM J. BROWN	)	O R D E R [Entered Oct. 6, 1980]
	)	
Respondents.	)	

The petitioner, Laura Spiker, filed her petition in this court for a writ of habeas corpus challenging her conviction and sentence for pandering obscenity, under O.R.C. §2907.32. That conviction was entered on April 25, 1977 by the Cleveland Municipal Court, Cuyahoga County, and was affirmed by the Eighth District Court of Appeals in a decision announced March 8, 1979. No appeal was

taken to the Ohio Supreme Court.

To entertain a petition for a writ of habeas corpus, the District Court must determine, first, that the petitioner is in custody, 28 U.S.C. §§2241(c)(1), and 2254(a); and second, that she has exhausted all her available state remedies. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 882 (1963); Wilwording v. Swenson, 404 U.S. 429, 92 S.Ct. 409 (1971).

In Hensley v. Municipal Court, 411 U.S. 343, 93 S.Ct. 1571 (1973) the court held that one released on personal recognizance pending execution of a sentence is in custody for purposes of habeas corpus relief.

With regard to the requirement that the petitioner exhaust her state remedies, the Sixth Circuit in Lucas v. People State of Michigan, 420 F.2d 259 (6th

Cir. 1970), held that if the state appeals courts have ruled contrary to the claims of constitutional violations raised by the habeas corpus petition, and it appears probable that they will adhere to their previous rulings, futile appeals will not be required. The exhaustion of state remedies does not necessitate appeals which are clearly futile. See Coleman v. Maxwell, 351 F.2d 285 (6th Cir.); Keener v. Ridenour, 594 F.2d 581 (6th Cir. 1979); Collins v. Perini, 448 F.Supp. 1006 (N.D. Ohio 1978).

In contradistinction to the decision of this court in Sovereign News Co. v. Falke, 448 F.Supp. 306 (N.D. Ohio, 1977), the Supreme Court of Ohio found the Ohio obscenity statute, Ohio Revised Code §2907.32, to be constitutionally unassailable. State v. Burgun, 56 Ohio St.

354, 384 N.E.2d 255 (1978). Moreover, the court affirmed its Burgun holding in a per curium opinion handed down one year later. State v. Thomas, 57 Ohio St. 2d 71, 387 N.E.2d 229 (1979). This court is persuaded that the Supreme Court of Ohio will not reverse its position regarding the constitutionality of Ohio Revised Code §2907.32. There being no requirement that the petitioner engage in a "judicial runaround," Lucas, supra at 262, the court finds that the petitioner is in custody and that she has exhausted all available state remedies.

Deciding that both jurisdictional prerequisites have been met, the court next considers the merits of the petitioner's claim. Section 2907.32 of the Ohio Revised Code makes it a violation to pander obscene material. Revised Code §2907.01. Petitioner claims the statute is constitutionally infirm in violation

of his First and Fourteenth Amendment rights because it is impermissibly vague and substantially overbroad and does not meet the test of constitutionality announced in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973).

The constitutionality of Ohio's obscenity statute has been considered by this court, Sovereign News Co. v. Falke, 448 F. Supp. 306 (N.D Ohio 1977), remanded sub nom, Sovereign News Co. v. Corrigan, 610 F.2d 428 (6th Cir. 1979), aff'd on rehearing, Sovereign News. v. Falke, No. C77-230 (N.D. Ohio, September 19, 1980) and by the Supreme Court of the State of Ohio; State v. Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978), and State v. Thomas, 57 Ohio St.2d 71, 387 N.E.2d 229 (1979). Notwithstanding this court's holding in Sovereign News declaring the statute unconstitutional, the Ohio State

Supreme Court in Burgun attempted to rewrite by judicial gloss and intricate statutory interpretation the statute enacted by the legislature.

For the reasons announced in its opinion in Sovereign News on remand issued on September 19, 1980 (which is appended to this order and incorporated into it by reference) this court finds that the petitioner was convicted under a statute which is unconstitutional and which cannot be rehabilitated through judicial gloss or intricate statutory interpretation. See Miller v. California, 413 U.S. 15 (1973); Ward v. Illinois, 431 U.S. 767, 97 S.Ct. 2085 (1977).

The petition for a writ of habeas corpus is granted. 42 U.S.C. §2254.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES
DISTRICT JUDGE

OPINION OF THE DISTRICT COURT
IN HABEAS CASE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK TUROSO,	)	CASE NO. C79-442
	)	
Petitioner,	)	JUDGE JOHN M.
	)	MANOS
v.	)	
	)	
CLEVELAND MUNICIPAL	)	O R D E R
COURT, et al.,	)	[Entered Oct. 6,
	)	1980]
Respondents.	)	

The petitioner, Frank Turoso, filed his petition in this court for a writ of habeas corpus challenging his conviction and sentence for pandering obscenity, under O.R.C. §2907.32. That conviction was entered on July 13, 1976 by the Cleveland Municipal Court, Cuyahoga County, and was affirmed by the Eighth District Court of Appeals in a decision announced February 8, 1979. No appeal was taken to the Ohio Supreme Court.

To entertain a petition for a writ of

habeas corpus, the District Court must determine, first, that the petitioner is in custody, 28 U.S.C. §§2241(c)(1), and 2254(a); and second, that he has exhausted all his available state remedies. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 882 (1963); Wilwording v. Swenson, 404 U.S. 429, 92 S.Ct. 409 (1971).

In Hensley v. Municipal Court, 411 U.S. 343, 93 S.Ct. 1571 (1973) the court held that one released on personal recognizance pending execution of a sentence is in custody for purposes of habeas corpus relief.

With regard to the requirement that the petitioner exhaust his state remedies, the Sixth Circuit in Lucas v. People State of Michigan, 420 F.2d 259 (6th Cir. 1970), held that if the state appeals courts have ruled contrary to the claims of constitutional violations raised by the habeas corpus petition, and it appears probable that they will

adhere to their previous rulings, futile appeals will not be required. The exhaustion of state remedies does not necessitate appeals which are clearly futile. See Coleman v. Maxwell, 351 F.2d 285 (6th Cir.); Keener v. Ridenour, 594 F.2d 581 (6th Cir. 1979); Collins v. Perini, 448 F.Supp. 1006 (N.D. Ohio 1978).

In contradistinction to the decision of this court in Sovereign News Co. v. Falke, 448 F.Supp. 306 (N.D. Ohio 1977), the Supreme Court of Ohio found the Ohio obscenity statute, Ohio Revised Code §2907.32, to be constitutionally unassailable. State v. Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978). Moreover, the court affirmed its Burgun holding in a per curium opinion handed down one year later. State v. Thomas, 57 Ohio St.2d 71, 387 N.E.2d 229 (1979). This court is persuaded that the Supreme Court of

Ohio will not reverse its position regarding the constitutionality of Ohio Revised Code §2907.32. There being no requirement that the petitioner engage in a "judicial runaround," Lucas, supra at 262, the court finds that the petitioner is in custody and that he has exhausted all available state remedies.

Deciding that both jurisdictional prerequisites have been met, the court next considers the merits of the petitioner's claim. Section 2907.32 of the Ohio Revised Code makes it a violation to pander obscene material. Revised Code §2907.01. Petitioner claims the statute is constitutionally infirm in violation of his First and Fourteenth Amendment rights because it is impermissibly vague and substantially overbroad and does not meet the test of

constitutionality announced in Miller v. California, 413 U.S. 15, 93 S.Ct 2607 (1973).

The constitutionality of Ohio's obscenity statute has been considered by this court, Sovereign News Co. v. Falke, 448 F.Supp. 306 (N.D. Ohio 1977), remanded sub nom, Sovereign News Co. v. Corrigan, 610 F.2d 428 (6th Cir. 1979), aff'd on rehearing, Sovereign News v. Falke, No. C77-230 (N.D. Ohio, September 19, 1980) and by the Supreme Court of the State of Ohio; State v. Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978), and State v. Thomas, 57 Ohio St.2d 71, 387 N.E.2d 229 (1979). Notwithstanding this court's holding in Sovereign News delcaring the statute unconstitutional, the Ohio State Supreme Court in Burgun attempted to rewrite by judicial gloss

and intricate statutory interpretation the statute enacted by the legislature.

For the reasons announced in its opinion in Sovereign News on remand issued on September 19, 1980 (which is appended to this order and incorporated into it by reference) this court finds that the petitioner was convicted under a statute which is unconstitutional and which cannot be rehabilitated through judicial gloss or intricate statutory interpretation. See Miller v. California, 413 U.S. 15 (1973); Ward v. Illinois, 431 U.S. 767, 97 S.Ct. 2085 (1977).

The petition for writ of habeas corpus is granted. 42 U.S.C. §2254.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES
DISTRICT JUDGE

OPINION OF THE DISTRICT COURT
IN HABEAS CASE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK TUROSO,	)	CASE NO. C79-747
	)	
Petitioner,	)	JUDGE JOHN M. MANOS
	)	
v.	)	
	)	
CLEVELAND MUNICIPAL COURT, et al.,	)	O R D E R [Entered Oct. 6, 1980]
	)	
Respondents.	)	

The petitioner in this case, Frank Turoso, seeks a writ of habeas corpus under 28 U.S.C. §2254 from his conviction for pandering obscenity in violation of Ohio Revised Code §2907.32. On March 24, 1976 the petitioner was convicted in Cleveland Municipal Court, fined $1,000 and sentenced to 120 days in jail (sixth days of which were suspended). His appeal of the conviction to the Court of Appeals for the Eighth Appellate District was denied as was his motion for reconsideration. On December 7, 1978

the Supreme Court of the State of Ohio affirmed the petitioner's conviction, and on January 17, 1979 the court refused him a rehearing.

Before considering a petition for a writ of habeas corpus the federal court must determine, first, wether the petitioner is in custody, 28 U.S.C. §§2241 (c)(1) and 2254(a); and second, whether he has exhausted all his available state remedies. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963). The court finds that the petitioner is in custody, Hensley v. Municipal Court, 411 U.S. 345, 93 S.Ct. 1571 (1973), and that he has exhausted his state remedies. Fay, supra, and County Court of Ulster v. Allen, 442 U.S. 140, 99 S.Ct. 2231 (1979).

Deciding the jurisdictional prerequisites in his favor, the court must next consider the merit of the petition-

er's claim. Section 2907.32 of the Ohio Revised Code makes it a violation to pander obscene material. Revised Code §2907.01. Petitioner claims that the statute violates his First and Fourteenth Amendment rights because it is impermissibly vague and substantially overbroad and does not meet the test of constitutionality as announced in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973).

The constitutionality of Ohio's obscenity statute has been considered by this court, Sovereign News Co. v. Falke, 448 F.Supp. 306 (N.D. Ohio 1977), remanded sub nom, Sovereign News Co. v. Corrigan, 610 F.2d 428 (6th Cir. 1979), aff'd on rehearing, Sovereign News v. Falke, No. C77-230 (N.D. Ohio, September 19, 1980) and by the Supreme Court of the State of Ohio; State v. Burgun, 56 Ohio

St. 2d 354, 384 N.E.2d 255 (1978), and State v. Thomas, 57 Ohio St. 2d 71, 387 N.E.2d 229 (1979).

In Sovereign News this court measured the definitionof obscenity in force in Ohio against the standards enunciated in Miller. It concluded that Ohio Revised Code §2907.01 was unconstitutionally overbroad in four separate instances and was unconstitutionally vague. It did so only after carefully considering whether the statute was susceptible to an authoritative construction by the state courts which could cure the statute's constitutional infirmities.

Subsequent to this court's decision in Sovereign News, the Ohio Supreme Court decided State v. Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978). In that case, the Ohio Supreme Court rejected overbreadth and vagueness challenges to Ohio

Revised Code §§2907.01 and 2907.32 and sustained constitutionality. The Ohio Supreme Court arrived at this result by simply incorporating the tripartite Miller test to the statute. This was done by leaving intact the five part disjunctive test of obscenity in Revised Code §2907.01 and adding to it at the end the three part conjunctive test of obscenity in Miller.

For the reasons announced in its opinion in Sovereign News on remand issued on September 19, 1980 (which is appended to this order and incorporated into it by reference) this court finds that the petitioner was convicted under a statute which is unconstitutional and which cannot be rehabilitated by judicial gloss or intricate statutory interpretation. See Miller v. California, 413 U.S. 15 (1973); Ward v. Illinois, 431 U.S. 767,

97 S.Ct. 2085 (1977).

The petition for a writ of habeas corpus is granted. 42 U.S.C. §2254.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES
DISTRICT JUDGE

OPINION OF THE DISTRICT COURT
IN HABEAS CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DALENE BURGUN,	:	C79-1900
Petitioner	:	
-vs-	:	MEMORANDUM OPINION
	:	AND ORDER
THE CLEVELAND	:	[Entered Nov. 24,
MUNICIPAL COURT	:	1980]
AND THE HONORABLE	:	
FRANK G. O'BELL	:	
and	:	
THE ATTORNEY	:	
GENERAL OF THE	:	
STATE OF OHIO,	:	
WILLIAM J. BROWN,	:	
Respondents	:	

Battisti, C.J.

Dalene Burgun was convicted for pandering obscenity under O.R.C. §2907.32. Having exhausted available state remedies, Burgun seeks a writ of habeas corpus in this Court. She alleges that her conviction was obtained and sentence imposed under a statutory scheme repugnant to

the First and Fourteenth Amendments. Specifically, the petitioner asserts, as she did in the Cleveland Municipal Court, the Ohio Court of Appeals, and the Ohio Supreme Court, that O.R.C. §2907.32, which proscribes pandering obscenity, and O.R.C. §2907.01(F), which defines obscenity, are unconstitutionally vague and overbroad, and cannot serve as the predicate for her conviction. The application is denied.

I

In Miller v. California, 413 U.S. 15 (1973), the Supreme Court established guidelines for the states to follow in regulating obscenity. Noting that any state regulation of obscene materials must be carefully limited, the court confined "the permissible scope of such regulation to works which depict or describe sexual conduct." Id. at 24.

The Court then set forth three basic guidelines for the trier of fact:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

By way of illustration, the court offered "a few plain examples of what a state statute could define for regulation under part (b) of the standard...," id. at 25:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of

the genitals."

In Ward v. Illinois, 431 U.S. 767 (1977), the Court upheld a state statute which was overbroad on its face but which had been "authoritatively construed" by the Illinois Supreme Court to incorporate the Miller guidelines. The statute in question defined "obscene" as follows:

> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

In People v. Ridens, 59 Ill.2d 362, 321 N.E.2d 264 (1974), the Illinois Supreme Court, on remand of an earlier judgment for reconsideration in light of Miller, had construed the statute to

incorporate parts (a) and (b) of the Miller standard, while retaining the "utterly without redeeming social value" standard of Memoirs v. Massachusetts, 383 U.S. 413 (1966), in preference to the less stringent criterion of part (c) of Miller. Although the Illinois court did not expressly define the kinds of sexual conduct the description or depiction of which was proscribed, the United States Supreme Court concluded that

> The Illinois court plainly intended to conform the Illinois law to part (b) of Miller, and there is no reason to doubt that, in incorporating the guideline as part of the law, the Illinois court intended as well to adopt the Miller examples, which gave substantive meaning to part (b) by indicating the kinds of materials within its reach. The alternative reading of the decision would lead us to the untenable conclusion that the Illinois Supreme Court chose to create a fatal flaw in its

statute by refusing to take cognizance of the specificity requirement set down in Miller. Ward, 431 U.S. at 767.

The question before this Court is whether the Ohio obscenity statute, as written or authoritatively construed, conforms with the requirements of Miller.

II

On its face, O.R.C. §2907.01(F), which defines the obscene materials the pandering of which is proscribed by O.R.C. §2907.32, is unconstitutionally vague and overbroad. Section 2907.01(F) provides:

> When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" of any of the following apply:
>
> (1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest,

> when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose.

As Judge Manos of this Court concluded in Sovereign News Co. v. Falke, 448 F.Supp. 306(N.D. Ohio 1977), remanded sub nom. Sovereign News Co. v. Corrigan, 610 F.2d 428 (6th Cir. 1979), "in four separate instances §2907.01 defines 'obscenity' in a manner that restricts constitutionally protected expression." 448 F.Supp. at 400.[1] Judge Manos

1. Specifically, Judge Manos concluded:

> First: Section 2907.01(F)(1)(2)(3)(4) and (5) fail to incorporate the three-part Miller test. The Miller test is a conjunctive three-part test, all parts of which must be satisfied before the material may be found obscene. However, under Ohio Revised Code §2907.01 material may be found obscene without the state being required to prove each of the three parts of Miller... An example of this is §2907.01(F)(1) which defines as "obscene," material whose "...dominant appeal is to prurient interest." Under Subsection (F)(1),

concluded that §2907.01 did "not lend

---

1 cont.
the Miller requirements that (b) the material be "patently offensive" and (c) that, "taken as a whole, it lacks serious literary, artistic, political or scientific value," need not be proven by the state before material can be found obscene. It is evident, therefore, that material which is not patently offensive, and which has, for example serious literary value, may, under Ohio Revised Code §2907.01(F), to be found to be obscene. The Court concludes that Ohio R.C. §2907.01 restricts material which is not 'obscene', making the statute overbroad.

Second: Section 2907.01(F)(3) unconstitutionally restricts the display or depiction of extreme or bizarre violence, cruelty or brutality. It is an express holding of Miller that only material depicting or describing sexual conduct may be barred as being obscene. See, Miller v. California, supra, 413 U.S. at 24, 93 S.Ct. 2607. Therefore, the restrictions placed on the description or depiction of extreme violance unconstitutionally restrains free expression, and the statute is therefore overbroad.

Third: Sections 2907.01(F)(1)(2)(3) and (5) unconstitutionally restrict the display and description of non-active sexual conduct. For example, simply nudity, such as the showing of a female breast or a male buttocks, may be considered obscene under §2907.01(F). A sexual depiction of that kind is not hardcore pornography, and cannot be restricted as being obscene... Therefore the court finds §2907.01 (F)(1)(2)(3)and (5) are overbroad in that they restrict non-hardcore sexual conduct.

itself to a narrowing construction. The statute is so substantially overbroad that only radical surgery could save it." Id., at 405.

Nevertheless, on December 7, 1978, the Ohio Supreme Court in State v. Burgun, 56 Ohio St. 2d 354 (1978), held that §2907.01(F)

> is neither unconstitutionally overbroad nor void for vagueness when it is read in pari materia with the Miller decision. The Miller test for defining obscenity is therefore incorporated into that statute by an "authoritative" state court construction specifically sanctioned by Miller. In addition, a close reading of R.C. 2907.01 in its entirety

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1 cont.

Fourth: Section 2907.01(F)(1) does not define with the requisite specificity the sexual acts the description or depiction of which is restricted. Subsection (F)(1) declares that any material whose "dominant appeal is to prurient interest" is obscene. The subsection is unconstitutionally overbroad because it does not list the types of sexual conduct to be restricted, and therefore may be applied to the depiction of sexual conduct not subject to restriction.

448 F. Supp. at 400 (footnotes omitted).

> shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited. Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted parameters, the appellants' proposition of law has no merit. 56 Ohio St.2d at 361.

It was in light of this decision of the Ohio Supreme Court that the Sixth Circuit Court of Appeals remanded Sovereign News to Judge Manos for further consideration. 610 F.2d 428 (6th Cir. 1979).

Recently, Judge Thomas of this Court has concluded that O.R.C. §2907.01, as construed by the Ohio Supreme Court in State v. Burgun, supra, is constitutional. Turoso v. Cleveland Municipal Court, et al., (C79-1010, N.D. Ohio, September 15, 1980). Respondents have requested that Judge Thomas' Memorandum and Order be included in the record of this action and be treated as persuasive authority.

Despite the fact that the Ohio Supreme Court did not explicitly incorporate the explanatory examples of Miller, Judge Thomas, "applying the teachings of Ward v. Illinois", concludes that

> "by expressly incorporating the Miller guidelines into O.R.C. 2907.01 (F) with full knowledge of the Miller 'examples' the Ohio Supreme Court has impliedly incorporated the Miller 'examples' as well." Turoso, slip op. at 17.

This, it is concluded, is sufficient to save the statute from the charge that it is unconstitutionally vague and overbroad, just as the facially invalid Illinois statute was similarly saved in People v. Ridens, supra. As the Supreme Court remarked in Ward, supra, 431 U.S. at 776,

> "[s]ince it is plain enough from its prior cases and from its response to

Miller that the Illinois court recognizes the limitations of the kinds of sexual conduct which may not be represented or depicted under the obscenity laws, we cannot hold the Illinois statute to be unconstitutionally overbroad."

The same must be said of the Ohio Supreme Court. Although the court did not explicitly define the kinds of sexual conduct which may not be depicted or described under Ohio's obscenity law, it did indicate its awareness of the Miller examples, and must be held to have implicitly incorporated them into the Ohio statute. That statute, as authoritatively construed, is therefore constitutional and can properly serve as the predicate for the petitioner's conviction.

Dalene Burgun's petition for habeas corpus is denied.

IT IS SO ORDERED.

/s/Frank J. Battisti

Frank J. Battisti

Chief Judge

OPINION OF THE DISTRICT COURT
IN HABEAS CASE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

WILLIAM LEE	)	CIVIL ACTION CASE
	)	NO. C79-474
Petitioner	)	
	)	[Entered Jan. 29,
v.	)	1981]
	)	
THE CLEVELAND	)	
	)	
MUNICIPAL COURT	)	
	)	
AND THE ATTORNEY	)	
	)	
GENERAL OF THE	)	
	)	
STATE OF OHIO	)	
	)	
Respondents.	)	

MEMORANDUM AND ORDER

This case is before the Court on review of the Report and Recommendation of the Magistrate.

Petitioner contends that §§2907.01 and 2907.32, Ohio Revised Code, are overbroad and vague and that his conviction under these statute denied him his rights as

guaranteed by the First and Fourteenth Amendments. Specifically, the petitioner objects to the Magistrate's finding that §2907.01(F) of the Ohio Revised Code satisfies the constitutional standard for defining obscenity as set forth in Miller v. California, 413 U.S. 15 (1973).

The Magistrate agrees with petitioner's contention that the language of §2907.01 (F) is unconstitutionally overbroad and vague. However, the Magistrate found that, although §2907.01 (F) is vague and overbroad on its face, the statute's defects were cured by judicial construction as rendered by the Ohio Supreme Court in State v. Burgun, 56 Ohio St. 2d 354 (1978), reh. denied (January 17, 1979).

In Burgun, the Ohio Supreme Court held that the definition of obscenity contained §2907.01 (F) is not unconstitutional when

construed to incorporate the Miller guidelines. The Ohio Supreme Court approved as constitutionally valid a conviction where the trial court's jury instructions combined §2907.01 (F) with the Miller guidelines.

However, it is the holding of this Court that the addition of the three-prong Miller formula to the statute is not sufficient to cure the statute's constitutional defects.

In Miller, the United States Supreme Court set forth three basic guidelines for defining obscenity:

> (a) Whether "the average person, applying contemporary community standards" would find that the work taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Id. at 24.

The second guideline in Miller, (b), requires that the proscribed sexual depictions be defined specifically by state law. Section 2907.01 fails to so specify, and the Miller formula itself does not provide any "specific proscribed sexual depictions." Hence, even when read in conjunction with the Miller guidelines, §2907.01 is unconstitutional. This Court finds the opinion in Sovereign News v. Falke, No. C77-230 (N.D. Ohio, Sept. 19, 1980), on remand from Sovereign News v. Corrigan, 610 F.2d 428 (6th Cir. 1979), to be persuasive on this issue. The Court therefore finds Ohio Revised Code §§2907.01 and 2907.32 void for vagueness and overbreadth. Petitioner's application for a writ of habeas corpus is hereby granted.

IT IS SO ORDERED.

/s/ Ann Aldrich
UNITED STATES DISTRICT JUDGE

JANUARY TERM, 1978: [56 Ohio St.2d]

Statement of the Case

384 N.E.2d 255

THE STATE OF OHIO, APPELLEE v. BURGUN, APPELLANT
THE STATE OF OHIO, APPELLEE v. BAYLESS, APPELLANT
THE STATE OF OHIO, APPELLEE v. TUROSO, APPELLANT
THE STATE OF OHIO, APPELLEE v. KRUTE, APPELLANT

[Cite as State v. Burgun (1978), 56 Ohio St. 2d 354.]

Criminal law - Definitions of "obscenity" -Constitutionality-Conviction sustained, when-Indicia of scienter constitutionally adequate, when.

1. R.C. 2907.01(F), which sets forth the definition of "obscenity," is neither unconstitutionally overbroad nor void for vagueness when it is authoritatively construed to incorporate the guidelines prescribed in Miller v. California, 413 U.S. 15.
2. Precise knowledge of the contents of obscene material is not a prerequisite to satisfy the requirement of scienter to sustain an obscenity conviction. Knowledge of the character or nature of obscene material is a constitutionally adequate indicium of scienter to sustain a conviction undre R.C. 2907.32(A)(4).

(Nos. 77-1144, 77-1154, 77-1155, 77-1279-Decided December 7, 1978.)

APPEALS from the Court of Appeals for Cuyahoga County.

The appeals before this court are a consolidation of four cases which originated in Cleveland Municipal Court. The facts surrounding the convictions are similar and can be summarized as follows:

In each case, detectives of the Cleveland Police Department entered adult bookstores during normal business hours where the appellants were employed as cashiers or clerks. The police officers proceeded to the rear of the premises and viewed films in booths with coin-operated projectors of the "peep show" variety.

Having viewed the films and noted their location in the store, affidavits were drawn up describing in detail the sexual activity that took place on the screen. The affidavits were presented to a Municipal Court judge who issued search warrants authorizing the seizure

of both the films and the projectors. The items were seized and the appellants arrested and charged with pandering obscenity in violation of R.C. 2907.32 (A)(4).

Each appellant received a jury trial in Cleveland Municipal Court. The prosecution in each case consisted primarily of the testimony of the officers who had viewed the films and subsequently completed the affidavits. In addition, each film was admitted in evidence and shown to the jury. Pre-trial motions to suppress and dismiss were overruled as were motions for acquittal filed during the course of the trials.

All four appellants were convicted under the statute for pandering obscenity.

On appeal, the Court of Appeals affirmed the judgment of the trial court in all four cases.

The causes are now before this court pursuant to the allowance of appellants' motions to certify the record.

Ms. Almeta A. Johnson, police prosecutor, Bertsch, Edelman & Fludine Co., L.P.A., and Mr. Bruce A. Taylor, for appellee.

Messrs. Berkman, Gordon, Kancelbaum & Levy, Mr. Bernard A. Berkman and Mr. Joshua J. Kancelbaum, for appellants.

OPINION I

The appellants have raised seven propositions of law. The first four propositions apply to all four appeals. Propositions No. 5 and 6 apply only to State v. Burgun, case No. 77-1144, and likewise proposition No. 7 is concerned solely with State v. Krute, case No. 77-1279.

In their first proposition of law, appellants contend that the definition of obscenity contained in R.C. 2907.01 (F) and incorporated in R.C. 2907.32 (A) (4) is both overbroad and vague and therefore in violation of their rights under the First and Fourteenth Amendments to the United States Constitution. The definition of "obscenity" set forth in R.C. 2907.01(F) reads as follows:

"When considered as a whole, and judged with reference to ordinary adults or, if

it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is 'obscene' if any of the following apply:

"(1) Its dominant appeal is to prurient interest;

"(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

"(3) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine sceintific, educational, sociological, moral, or artistic purpose;

"(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose."

The definition is incorporated into R.C. 2907.32(A)(4) which formed the basis for the prosecution in the present appeals and states, in pertinent part:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

"***

"(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance when such performance is presented publicly, or when admission is charged ***."

The essence of the appellants' criticism is that the definition in R.C. 2907.01(F) is overbroad "on its face" because an item can be considered "obscene" if any of the characteristics outlined in subsections (1) through (5) are present. Since the statute is written in disjunctive rather than conjunctive language, it is alleged that a conviction can be obtained without a finding that the tripartite test in Miller v. California (1973), 413 U.S. 15 has been satisfied.

In that case the United Staets Supreme Court, at pages 24-25, described the permissible scope of state regulation of obscenity and the three-pronged inquiry to be adopted by the trier of fact as

follows:

"*** As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * *; (b) whether the work depicts or describes in a patently

offensive way sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. * * * If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." (Citations omitted; emphasis added.)

In addition to the criticism that subsections (1) through (5) do not facially incorporate the three-part Miller test, the appellants have asserted other instances where the statute conflicts with that decision. It is argued that subsection (3) unconstitutionally restricts the depiction of

extreme violence when only material depicting or describing sexual conduct may be limited as being obscene. In addition, appellants argue that subsections (1), (2), (3) and (5) are facially overbroad because acts of "'simple nudity'" as opposed to hard core pornography can also be considered to be "'obscene.'" Likewise, what is meant by material whose "'dominant appeal is to prurient interest'" is cited as a further example of unconstitutional overbreadth. Finally, it is argued that the general lack of specificity found in R.C. 2907.01(F) warrants not only a finding of unconstitutional overbreadth but also a determination that the entire statute is void for vagueness.

In summary, appellants allege in effect that the statute not only has not been "limited, as written," in light of the

Miller guidelines but also is incapable of a "narrowing construction" in conformity with that decision. We disagree.

The United States Supreme Court did not intend for every state legislature to rewrite its obscenity statutes as a result of the Miller decision. As indicated, an "authoritative construction" of applicable state law limiting the regulation of obscenity by the guidelines in that decision would be constitutionally sufficient.

Following that mandate this court was faced with a construction of the predecessors to the statutes under attack in the present case, R.C. 2905.34 and 2905.35, immediately following the Miller decision in State, ex rel. Sessenbrenner, v. Book Store (1973), 35 Ohio St.2d 220 and State, ex rel. Keating v. Vixen (1973), 35 Ohio St.2d 215. 1/

1/ R.C. 2905.34(A)(1) through (4) stated, in pertinent part:

In Vixen this court held, at page 219, that the statutory definitions "comport with the standards enunciated in Miller." Similar language is found in Sensenbrenner, at page 221, where this court indicated:

"It is apparent that, if these causes were remanded to the Court of Common Pleas, the trier of the facts, given the standards expressed in Miller and the provisions of R.C. 2905.34 as guides for

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1/ cont.

"(A) Any material or performance is 'obscene' if, when considered as a whole and judged with reference to ordinary adutls, any of the following apply:

"(1) Its dominant appeal is to prurient interest;

"(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

"(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

"(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose." (Emphasis added.)

determining the issue of obscenity, could come to no other conclusion than the one reached in the first instance." The application of the Miller guidelines to Ohio obscenity law was also noted by this court in State, ex rel. Ewing, v. Without a Stitch (1974), 37 Ohio St.2d 95. In that case, the appellants had attacked the definition of nuisance contained in R.C. 3767.01(C) which, in turn, had incorporated the definition of obscenity upheld in Vixen, supra. This court repeated its prior holding and stated once again, at page 101, that " the definition of obscene material contained in R.C. 2905.34 comports with the constitutional definition of the word 'obscenity' as enunciated in Miller v. California * * *." Subsequently, on April 21, 1975, the United States Supreme Court summarily upheld that

decision by dismissing an appeal from one of the defendants for "want of a substantial federal question." Art Theater Guild, Inc., v. Ewing (1975), 421 U.S. 923.

The essence of these three Ohio decisions was not that the wording of R.C. 2905.34(A)(1) through (4) visibly, literally, or facially incorporated the tripartite Miller test in each of those subsections. What this court attempted to spell out was that the wording of the entire statute, when construed in pari materia with the Miller decision, adequately protected the First Amendment values applicable to the states through the Fourteenth Amendment. R.C. 2905.34 contained the same disjunctive language currently under attack as well as being more general in its terms and definitions than its successor, R.C. 2907.01(F).

The United States Supreme Court has recently reinforced its policy of upholding facially overbroad state obscenity statutes that have been "narrowed" by an "authoritative construction" in light of the Miller guidelines. In Ward v. Illinois (1977), 431 U.S. 767, the United States Supreme Court was dealing with a state statute that had been patterned after the test for obscenity enunciated in Roth v. United States (1957), 354 U.S. 476.[2/]

As in the cases before this court, the statute was attacked as being unconstitutionally overbroad and vague. Yet, a close reading of that statute reveals

2/ The importance of Roth v. United States, supra, was also noted by the General Assembly in the passage of R.C. 2907.01(F) as indicated by the Committee Comment to that statute:

"The definition of obscenity is designed to meet the requirements of Roth v. United States * * *, and cases following in its wake. It spells out what is 'obscene' in much greater detail than existing case law, in order to increase the utility of the definition for law enforcement purposes."

a far more generalized description of obscenity than that found in R.C. 2907.01 (F). The statute reads, in pertinent part:

"A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs." Illinois Rev. Stat., Chapter 38, Section 11-20-(b) (1975).

The United States Supreme Court pointed out that subsequent to the Miller decision, Illinois Supreme Court decisions had proceeded to "construe" Section 11-20 of their Criminal Code to "incorporate" the guidelines in that decision. Id.,

at pages 774-75. As a result of that state Supreme Court's "response to Miller," the court indicated, at page 776, that it would not hold the Illinois statute to be "unconstitutionally overbroad."

This court, as previously noted in Vixen and Sensenbrenner, supra, has followed a somewhat similar "response to Miller" in its construction of R.C. 2905.34. Today, that "response" continues with a further clarification by the interpretation and application of its successor, R.C. 2907.01(F).

We hold that R.C. 2907.01(F) is neither unconstitutionally overbroad nor void for vagueness when it is read in pari materia with the Miller decision. The Miller test for defining obscenity is therefore incorporated into that statute by an "authoritative" state court

construction specifically sanctioned by Miller. In addition, a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited. Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted parameters, the appellants' proposition of law has no merit.

In three of the four appeals before this court the trial court adhered to the foregoing interpretation of Ohio obscenity law. In each instance the jury was instructed initially under the ohio statute and then given a "narrowing" instruction restricting the definition of obscenity to the test laid down in Miller. In light of that interpretation and application of R.C. 2907.01(F) this proposition of law is not well-taken and hereby overruled, except in State v. Burgun, case No. 77-1144, where the

failure to instruct on Miller was reversible error.

II.

In their second proposition of law, the appellants argue that a judge must view films such as these prior to the issuance of any search warrant. Furthermore, if viewing the film is not possible the affidavits which form the basis of a subsequent warrant must reflect sufficient to satisfy the Miller test.

In order to issue a valid warrant the appropriate judicial officer must be able to "'focus searchingly on the question of obscenity.'" Roaden v. Kentucky (1973), 413 U.S. 496, 506. In addition, no cases have been cited where it has been specifically held that a judge or magistrate must view an alleged obscene film prior to the issuance of a search warrant. To make that procedure a

mandatory prerequisite to the issuance of a warrant would place an undue burden on an already overladen criminal justice system.

The affidavits in these cases were complete and specific in describing the sexual activity that took place in the films, as well as containing facts relating to the lack of titles, costs of operation, and running time. Taken as a whole, the affidavits contain sufficient facts to authorize a constitutionally sufficient warrant. Roaden, supra; Heller v. New York (1973), 413 U.S. 483. The Municipal Court judge in each instance herein had a full opportunity to make an independent judicial determination of probable cause prior to issuing the warrants and to "focus searchingly on the question of obscenity" in light of the Miller test.

This proposition of law is overruled.

III.

In their third proposition of law, appellants argue that knowledge of both the content and the character of the films is required to satisfy the scienter element for pandering obscenity in R.C. 2907.32. In addition, it is alleged that the circumstantial evidence presented at the trials did not support a finding that the appellants had the requisite mens rea.

The requirement of some degree of scienter to sustain an obscenity conviction such as those before this court was clearly mandated by Smith v. California (1959), 361 U.S. 147. However, the United States Supreme Court did not limit the states by spelling out the particular type of mens rea that would be constitutionally sufficient.

The predecessor to the current statute on pandering obscenity was R.C. 2905.35, which was specifically worded so as to

require "knowledge of the content and character" of obscene material as a prerequisite to prosecution.[3] The necessity of finding knowledge of the "content" of the material was further reinforced by this court's decision in State, ex rel. Ewing, supra. However, by requiring that knowledge of the "content" of obscene material is necessary,

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3/ R.C. 2905.35 stated, in pertinent part:

"No person, with knowledge of the content and character of the obscene material or performance involved, shall make, manufacture, write, draw, print, reproduce, or publish any obscene material, knowing or having reasonable cause to know that such material will be sold, distributed, circulated, or disseminated; or sell, lend, give away, distribute, circulate, disseminate, exhibit, or advertise any obscene material; or write, direct, produce, present, advertise, or participate in an obscene performance; or possess or have in his control any obscene material with intent to violate this section; or offer or agree to do any act in violation of this section, or cause any such act to be done by another.

"Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than one year, or both, for a first offense, and for each subsequent offense shall be fined not more than ten thousand dollars or imprisoned not less than one nor more than seven years or both." (Emphasis added.)

this court did not imply that there be either knowledge of the actual content or the fact that it was legally obscene. See Rosen v. United States (1896), 161 U.S. 29.

The current statute under which these appellants were convicted, R.C. 2907.32 (A), describes the requisite element of scienter as follows: "No person, with knowledge of the character of the material or performance involved, shall do any of the following * * *." (Emphasis added.) Furthermore, R.C. 2907.35 (A) (2) described a situation when a rebuttal presumption of that "knowledge" will arise:

"(A) An owner or manager, or his agent or employee, of a bookstore, newsstand, theater, or other commerical establishment engaged in selling materials or exhibiting performances who, in the course of business:

"* * *

"(2) Does any of the acts prohibited by section 2907.31 or 2907.32 of the Revised Code, is presumed to have knowledge of the character of the material or performance involved, if he has actual notice of the nature of such material or performance, whether or not he has precise knowledge of its contents." (Emphasis added.)

As indicated by the statutory language, "precise knowledge" of "contents" is unnecessary and instead the emphasis is on "notice" of the "nature" of the material.

Knowledge of the "character" or "nature" of obscene material has been held to be a constitutionally adequate indicium of scienter to uphold an obscenity conviction. Mishkin v. New York (1966), 383 U.S. 502, rehearing denied 384 U.S. 934; United States v.

Hill (C.A. 5, 1974), 500 F.2d 733, certiorari denied 420 U.S. 952; United States v. Groner (C.A. 5, 1974), 494 F.2d 499, certiorari denied 419 U.S. 1010; United States v. Thevis (C.A. 5, 1973), 484 F.2d 1149, certiorari denied 418 U.S. 932, rehearing denied 419 U.S. 886. In light of the foregoing we conclude that "knowledge of the character of the material" is sufficient to sustain a conviction under R.C. 2907.32(A)(4).

In proving a defendant had knowledge of the character of obscene material the state may rely solely on circumstantial evidence. Smith v. California, supra at page 154; State v. American Theatre Corp. (1975), 193 Neb. 289, 227 N.W. 2d 390. A survey of the records in these four appeals reveals that the appellants were all involved in the operation of the bookstores as cashiers or clerks. Their

position placed them in the front of the premises where they were in full view of sexually oriented magazines, books, artificial sexual aides and related sexual paraphernalia located in display cases. The movies were shown in the rear of the premises in booths with coin-operated projectors.

As employees responsible for selling these materials and dispensing change to customers, the evidence presented is sufficient so that a jury could have inferred beyond a reasonable doubt that the appellants had knowledge of the character of the films being shown. Appellants' third proposition of law is overruled.

IV

In the appellants' fourth proposition of law, claim is made the R.C. 2907.35 (C), providing a qualified exemption for

projectionists who have neither a financial interest in their place of employment nor any managerial responsibilities over its operation, violates the Equal Protection Clause of the Fourteenth Amendment.

Before an individual can challenge state legislation as violative of the federal constitution he must bring himself within the class affected by the unconstitutional feature. Arkadelphia Co. v. St. Louis S. W. Ry. Co. (1919), 249 U.S. 134, 149. In other words, a person who is seeking to raise the issue of the validity of a discriminatory enactment has no standing for that purpose unless he belongs to the class which is prejudiced by the statute. Witham v. South Side Bldg. & L. Assoc. (1938), 133 Ohio St. 560; Anderson v. Brown (1968), 13 Ohio St. 2d 53.

It is uncontroverted that none of the appellants offered proof at the trial

court level to show that they were in a position similar to that of the projectionists. There is insufficient probative evidence in the record to establish that a proper person has brought himself within the class of persons standing in the same position as the statutorily exempted projectionists.

Appellants' fourth proposition of law is overruled.

V

Proposition of law No. 5 relates solely to State v. Burgun, Case No. 77-1144. Appellant Burgun alleges that in a prosecution under R.C. 2907.32 it is error for a trial court to fail to instruct the jury on the definiton of obscenity established in Miller v. California, supra. The trial judge instructed the jury solely under the statute. Pursuant to the discussion

in Part I of this opinion the failure to give a narrowing instruction was reversible error.

VI

In proposition of law No. 6, appellant Burgun alleges that it was error for the trial court both to fail to dismiss a complaint under R.C. 2907.32(A)(4) which lacks an allegation that the accused had knowledge of the "content" of the allegedly obscene material and to fail to instruct the jury on the necessity of such knowledge. In light of the discussion of the degree of scienter required for a prosecution under this statute in Part III of this opinion knowledge of the "character" of the material is all that is necessary. Appellant Burgun's proposition of law is overruled.

VII.

The seventh proposition of law relates solely to State v. Krute, case No. 77-1279. Appellant Krute argues that certain remarks made by the prosecutor in his closing argument were so prejudicial they deprived him of his right to a fair and impartial trial. The appellant claims the prosecutor urged the jury to convict him to help stamp out obscenity, injected his own personal views, and argued points unsupported by the evidence.

Upon a careful review of the record it is evident, as the Court of Appeals noted, that some of the remarks made by the prosecution were improper. However, there is no evidence in the record that indicates that they were so prejudicial or inflammatory as to deprive this appellant of his constitutional right to a fair trial. This proposition of law is overruled.

The propositions of law that relate to State v. Bayless, case No. 77-1154; State v. Turoso, case No. 77-1155; and State v. Krute, case No. 77-1279 are not well-taken and those judgments are affirmed. Proposition of law No. 5 relating to State v. Burgun, case No. 77-1144, is well-taken. The judgment of the Court of Appeals in case No. 77-1144 is reversed and that cause is remanded for a new trial in accordance with the foregoing opinion.

Judgment accordingly.

Leach, C.J., Herbert, P. Brown, Sweeney and Locher, J J., concur

W. Brown, J. concurs in case No. 77-1144, but dissents in cases Nos.77-1154, 77-1155 and 77-1279.

ORDER DENYING REHEARING

No. 80-3694

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SOVEREIGN NEWS CO.,	)	
Plaintiff-Appellee,	)	O R D E R [Entered Mar. 23, 1982]
vs.	)	
LEE C. FALKE, ET AL.,	)	
Defendants,	)	
ROY WARNER, ET AL.,	)	
Defendants-Appellants.	)	

Before: EDWARDS, Chief Judge, ENGEL, Circuit Judge, and PHILLIPS, Senior Circuit Judge

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this court having moved for rehearing en banc

and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's opinion,

Now, therefore, the motion for rehearing is hereby denied.

Entered by order of the Court

/s/ John Siklima

Clerk

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive

and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to

support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any

setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. §1343 (As Worded At The Time The Complaint in This Case Was Filed)

§1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by

any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. §2201 (As Worded At The Time The Complaint In This Case Was Filed)

§2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

42 U.S.C. §1983 (As Worded At The Time The Complaint In This Case Was Filed)

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

OHIO REVISED CODE §2907.01

§2907.01 Definitions.

As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether

the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description,

or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity that tends to glorify or glamorize the activity, and that, with respect to juveniles, has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of

sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, crueltly, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an

interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture,

figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

(L) "Spouse" means a person married to an offender at the time of an alleged offense, except that such person shall not be considered the spouse when any of the following apply:

(1) When the parties have entered into a written separation agreement authorized by section 3103.06 of the Revised Code;

(2) During the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or alimony;

(3) In the case of an action for alimony, after the effective date of the judgment for alimony.

OHIO REVISED CODE §2907.32

§2907.32 Pandering obscenity.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance,

when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section

2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

Office - Supreme Court, U.S.
FILED
AUG 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOVEREIGN NEWS COMPANY,

Petitioner,

—v—

JOHN T. CORRIGAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Ohio's obscenity statute, as written and construed by the Ohio Supreme Court and upheld by the Court of Appeals below, is unconstitutionally overbroad or vague under the First and Fourteenth Amendments.

STATEMENT OF THE CASE

On February 4, 1982, the United States Court of Appeals for the Sixth Circuit handed down two companion opinions upholding the Ohio obscenity laws.

In Sovereign News Co. v. Falke, et al., 674 F.2d 484 (6th Cir. 1982), the Court of Appeals upheld the Ohio statutes and vacated and remanded the District Court judgment which had reaffirmed its 1977 Declaratory Judgment that Ohio's laws were unconstitutional and also continued the 1977 Preliminary Injunction against enforcement of those statutes by the Cleveland Police Officers and the Cuyahoga County prosecutor.

In Turoso, et al. v. Cleveland Municipal Court, et al., 674 F.2d 486 (6th Cir. 1982), the Court of Appeals upheld the Ohio obscenity law and held that the petitioners for writs of habeas

corpus were not entitled to habeas relief and were lawfully convicted. This second opinion in the habeas cases contains the reasoning of the Court of Appeals and analysis of the Ohio statute and its judicial construction by the Ohio Supreme Court.

As pointed out in this Brief in Opposition, this Court's 1977 opinion in Ward v. Illinois, infra, upholding the Illinois obscenity laws as construed by the Illinios Supreme Court, demonstrates that the construction of Ohio's statute by the Ohio courts is also consistent with the Constitution and makes consideration of these statutory questions unnecessary at this time.

REASONS FOR DENYING THE WRIT

The Supreme Court Of Ohio Authoritatively Construed The Ohio Obscenity Statute To Conform With Miller v. California And The Statute Is Therefore Constitutional.

On December 7, 1978, the Supreme Court of Ohio rendered its decision in State of Ohio v. Ronald Burgun, et al., 56 Ohio St.2d 354, 356-61, 384 N.E.2d 255, 258-61. Rehearing was denied by the Ohio Supreme Court on January 17, 1979. (No appeal as of right taken to the United States Supreme Court.) This decision specifically held that the definition of obscenity contained in Ohio Revised Code Section 2907.01(F) is not unconstitutionally vague or overbroad, in light of the First Amendment, when read in pari material with, and as construed to include, the guidelines of Miller v. California, 413 U.S. 15, at 24-25 (1973).

This important holding of Ohio's highest court is summarized in 56 Ohio St.2d, at 361, 384 N.E.2d, at 261:

> We hold that R.C. 2907.01(F) is neither unconstitutionally overbroad nor void for vagueness when it is read in pari material with the Miller decision. The Miller test for defining obscenity is therefore incorporated into that statute by an "authoritative" state court construction specifically sanctioned by Miller. In addition, a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited. Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted parameters, the appellants' proposition of law has no merit.

This statement of the Ohio Supreme Court goes to the heart of this federal controversy. This is the case which was referred to as "Burgun II" by the District Court, in finding that the statute "had not been interpreted to

contain the Miller test". Sovereign News Co. v. Falke, 448 F.Supp. 306, at 401 (N.D. Ohio E.D., October 31, 1977). The Cleveland Police Officers submit that the Burgun decision is determinative of the issue of the obscenity statute's validity and mandates that the Court of Appeals decision upholding the statute be affirmed.

It is a fundamental principle in federal actions which seek to test the constitutionality of state statutes or ordinances that if the court of last resort of the state has decided that the statute or ordinance is valid, the federal court is bound by the decision and must yield to the decision of the state court, unless it appears that the law, as construed, contravenes some provisions of the Federal Constitution. As stated in Crowley v. Christensen, 137

U.S. 86, at 92, 34 L.Ed. 620, at 624 (1890):

> The Supreme Court of the State has decided that the ordinance in question, under which the petitioner was arrested, and is held in custody, was thus authorized and is valid. That decision is binding upon us unless some inhibition of the Constitution or of a law of the United States is violated by it.

Once a state supreme court places a judicial construction upon a statute, all courts must thereafter consider the statute as if it had been originally passed in the words adopted by the limiting court. The federal courts, including the United States Supreme Court, must accept the state court's construction and proceed to test its validity only on that basis, under the traditional standard of "reasonableness". In Guaranty Trust Co. V. Blodgett, 287 U.S. 509, at 513, 77 L.Ed. 463, at 465 (1933), this Court reviewed a statute

which had been construed by the Superior Court of Connecticut, and proceeded to review it on that basis:

> [W]e are bound the decision of that court as though the meaning as fixed by the court had been expressed in the statute itself in specific words.

This principle has been consistently followed and applied by this Court, and this language often repeated. See: Albertson v. Millard, 345 U.S. 242, at 244-45, 97 L.Ed. 983, at 985 (1953); United States v. Burnison, 339 U.S. 87, at 89, 94 L.Ed. 675, at 680 (1950); Aero Mayflower Transit Co. v. Board of R. Comrs., 332 U.S. 495 at 499-500, 92 L.Ed. 99, at 104-05 (1947).

This principle has been applied in particular to cases dealing with the construction of obscenity statutes. This Court in Kingsley Pictures Corp. v. Regents, 360 U.S. 684, at 688, 3 L.Ed.2d

1512, at 1516 (1959), noted that the New York Court of Appeals had construed its statute in relation to the film "Lady Chatterly's Lover", and stated:

> We accept the premise that the motion picture here in question can be so characterized. We accept too, as we must, the construction of the New York Legislature's language which the Court of Appeals has put upon it. . . . (Emphasis added.)

In Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, at 60-62, and 63 (1966), this Court again followed and approved an interpretation of New York statutes by New York appellate courts.

The same issue presented here was disposed of when this Court upheld the Illinois pre-Miller statute based upon the limitations and constructions placed on the statute by the Illinois Supreme Court. The Court in Ward v. Illinois, 431 U.S. 767, 52 L.Ed.2d 738 (1977), noted that in 1965 the Illinois Supreme

Court detailed what kind of sexual conduct was cognizable by the Illinois statute.

> The construction of the statute in Sekara gives detailed meaning to the Illinois law, is binding on us, and makes plain that Section 11-20 reaches the kind of sexual materials which we now have before us. If Ward cannot be convicted for selling these materials, it is for other reasons and not because the Illinois statute is vague and gave him no notice that the statute purports to ban the kind of materials he sold. The statute is not vague as applied to Ward's conduct. Id., 431 U.S., at 772-73, 52 L.Ed.2d, at 745. (Emphasis added.)

Ward also noted that in 1974, the Illinois Supreme Court "proceeded to 'construe section 11-20 . . . to incorporate parts (a) and (b) of the Miller standards' . . . but to retain the 'utterly without redeeming social value' standard of Memoirs in preference to the more relaxed criterion contained in part (c) of the Miller guidelines". Ward,

supra, 431 U.S. at 744, 52 L.Ed. 2d, at 746. In 1975 the Illinois Supreme Court again noted that it had incorporated parts (a) and (b) of Miller and the "explanatory examples" found in Miller at 413 U.S., at 25. This Court affirmed Ward's convictions, stating:

> Given that Illinois has adopted Miller's explanatory examples, what the State has done in attempting to bring its statute in conformity with Miller is surely as much as this Court did in its post-Miller construction of federal obscenity statutes. Ward, 431 U.S., at 776, 52 L.Ed.2d, at 747-48.

This effort by the Illinois Supreme Court to conform with Miller was duplicated by the Ohio Supreme Court on remand from Miller, in State, ex rel. Keating v. Film Entitled "Vixen", 35 Ohio St.2d 215, at 218-19 (Sept. 26, 1973), and State, ex rel. Sensenbrenner v. Adult Book Store, 35 Ohio St.2d 220, at 221 (Sept. 26, 1973), cert. denied, 421 U.S.

934 (1975). This pattern continued in the Ohio courts with Hollington v. Ricco, 40 Ohio App.2d 57, at 60, 65-66, 318 N.E. 2d 442 (Cuyahoga County, Dec. 14, 1973), and State, ex rel. Ewing v. Film Entitled "Without a Stitch", 37 Ohio St.2d 92, at 98-101, 307 N.E.2d 911 (Feb, 27, 1974), appeal "dismissed for want of a substantial federal question", 421 U.S. 923 (April 21, 1975). Subsequently, both the Court of Appeals for Cuyahoga County and for Montgomery County, Ohio, approved an interpretation of the Ohio statute to include the "Miller Test". State of Ohio v. Dalene Burgun, 49 Ohio App.2d 112, 359 N.E.2d 1018 (Cuyahoga County, 1976); State of Ohio v. Today's Bookstores, Inc., No. 5248 (Montgomery County Appeal, 1977). This policy of Ohio Courts, and particularly the Ohio Supreme Court, culminated clearly and decisively in State v. Ronald Burgun, 56 Ohio St.2d

354, 356-61, 384 N.E.2d 255, 258-61 (Dec. 7, 1978), rehearing denied January 17, 1979, and State v. Thomas, 57 Ohio St.2d 71, 72 (March 21, 1979) (Per Curiam), where the entire "Miller Test" was specifically adopted into Ohio law and mandated as part of every jury instruction under the definition of obscenity. No appeal was taken by any of the three persons whose convictions were affirmed, Frank Turoso, William Krute, or Thomas Bayless, or by Ronald Burgun, whose case was remanded for trial, even though there was a right of direct appeal to the U.S. Supreme Court. The opinion in that case is, therefore, a final and binding mandate for Ohio.

Several convicted pornographers, including the Sovereign News Company, Petitioner in No. 81-2326, and the habeas petitioners in No. 81-2266, raised arguments in the Cleveland Municipal

Court, the Cuyahoga County Court of Appeals, the District Court, and the U.S. Court of Appeals, that the Ohio statute is invalid because it fails to specifically define sexual conduct in accordance with the examples given in Miller, supra at 25. The District Court in "Sovereign I" accepted these arguments in striking down Section 2907.01(F) of the Ohio Revised Code in Sovereign News Co. v. Falke, 448 F.Supp., at 400, where Judge Manos found that Ohio law permitted material to be found obscene if it contained "simple nudity" or any "display or depiction of extreme or bizarre violence, cruelty or brutality". These arguments were disposed of by the Ohio Supreme Court in Ronald Burgun, supra, 56 Ohio St.2d, at 357-58, 384 N.E.2d, at 258-59:

> The essence of the appellants' criticism is that the definition in R.C. 2907.01

(F) is overbroad "on its face" because an item can be considered "obscene" if any of the characteristics outlined in subsections (1) through (5) are present. Since the statute is written in disjunctive rather than conjunctive language, it is alleged that a conviction can be obtained without a finding that the tripartite test in Miller v. California (1973), 413 U.S. 15 has been satisfied.

In addition to the criticism that subsections (1) through (5) do not facially incorporate the three-part Miller test, the appellants have asserted other instances where the statute conflicts with that decision. It is argued that subsection (3) unconstitutionally restricts the depiction of extreme violence when only material depicting or describing sexual conduct may be limited as being obscene. In addition, appellants argue that subsections (1), (2), (3) and (5) are facially overbroad because acts of "'simple nudity'" as opposed to hard core pornography can also be considered to be "'obscene.'" Likewise, what is meant by material whose "'dominant appeal is to prurient interest'" is cited as a further example of unconstitutional overbreadth.

> Finally, it is argued that the general lack of specificity found in R.C. 2907.01(F) warrants not only a finding of unconstitutional overbreadth but also a determination that the entire statute is void for vagueness.
>
> In summary, appellants allege in effect that the statute not only has not been "limited, as written," in light of the Miller guidelines but also is incapable of a "narrowing construction" in conformity with that decision. We disagree.
>
> The United States Supreme Court did not intend for every state legislature to rewrite its obscenity statutes as a result of the Miller decision. As indicated, an "authoritative construction" of applicable state law limiting the regulation of obscenity by the guidelines in that decision would be constitutionally sufficient. (Emphasis the Court's.)

This first Sovereign News opinion relied upon the lower Court of Appeals decision in State v. Ronald Burgun which was reversed and remanded by the Ohio Supreme Court. The Sovereign News

decision pointed to the Ohio Court of Appeals decision as evidence that the statutory definition had not been construed by the Ohio courts to include the "Miller Test", 448 F.Supp., at 403:

> Because this court has found Section 2907.01 to be overbroad on its face, and that it has not been narrowed to constitutionally permitted parameters by an authoritative state court interpretation, the court finds Ohio Revised Code Sections 2907.01 and 2907.32 to be overbroad. (Emphasis added.)

The "Sovereign I" opinion, supra at 405, also expressed the opinion that Ohio's statute was incapable of a constructive narrowing and stated that "the court never-the-less would find the statute unconstitutionally overbroad":

> Section 2907.01 does not lend itself to a narrowing construction. The statute is so substantially overbroad that only radical surgery could save it.

The Burgun decision is fair warning to all that only those types of sexual exhibitions and conduct which could be sanctioned by Miller may be illegal in Ohio. Furthermore, the Sovereign News Company was on notice by the decision of the Cuyahoga County Court of Appeals in State v. Dalene Burgun, 49 Ohio App.2d 112, 359 N.E.2d 1018 (1976), and State v. Today's Bookstore, Inc., supra (Montgomery County Court of Appeals, 1977), that its pornography would be judged according to the guidelines of Miller.

The Miller decision itself, and the Ohio statute as well, both limited obscenity to avoid the problems found in Sovereign News as to "simple nudity" and violence. As to nudity, it was held in Miller, supra at 25, that "lewd exhibitions of the genitals", without further sexual conduct, could form the

basis for obscenity as long as it would be presented in a prurient and patently offensive manner and lacked serious value. Furthermore, it was held in Ohio in 1948 that simple nudity cannot be considered obscene under Ohio law. State of Ohio v. Lerner, 51 Ohio Law Abs. 321, 81 N.E.2d 282, at 286, 292 (Hamilton County, C.P., 1948).

As to violence, Section 2907.01(F)(3), by its express wording, limits "extreme or bizarre violence, cruelty, or brutality" to a sexual type which must have a "dominant tendency to arouse lust". It is clear that not simple nudity but only lewd-genital nudity can be found obscene under Ohio law and the three-part "Miller Test" and only sadomasochistically sexual violence can form the basis of obscenity under Ohio law. Therefore, pure assult-type violence and "horror movie" type cruelty

would be specifically excluded from Ohio law by the wording of the statute itself.

The Ohio Supreme Court, in Burgun, supra, 56 Ohio St.2d, at 357, 360-61, 384 N.E.2d, at 259, 260, first recognized that the Miller case controls the scope of sexual conduct which can be regulated as well as the test or inquiry to be applied thereto, and then noted that its past decisions had adopted the "Miller Test" under the former similar statute, and that this adoption had been upheld by the dismissal for "want of a substantial federal question" in Art theatre Guild, Inc. v. Ewing, 421 U.S. 923 (1975):

> In the case [Miller] the United States Supreme Court, at pages 24-25, described the permissible scope of state regulation of obscenity and the three-pronged inquiry to be adopted by the trier of fact. . . . (Emphasis added.)
>
> The essence of these three Ohio decisions [including Ewing] was not that the wording of R.C. 2905.34 (A) (1) through

> (4) [the former similar statute] visibly, literally, or facially incorporated the tripartite Miller test in each of those subsections. What this court attempted to spell out was that the wording of the entire statute, when construed in pari materia with the Miller decision, adequately protected the First Amendment values applicable to the states through the Fourteenth Amendment. R.C. 2905.34 contained the same disjunctive language currently under attack as well as being more general in its terms and definitions than is successor, R.C. 2907.01(F).

The Ohio Supreme Court used the terms "construed . . . with the Miller decision" because it was obvious that the entire decision was meant to be complied with and adopted into Ohio law, including the limitations on "sexual conduct" and "lewd exhibition of the genitals" of Miller at 25. The reasoning against a reading of Burgun in any other fashion was underscored by the Court in Ward v. Illinois, 431 U.S. 767, at 775 (1977),

where the Court rejected the argument that the Illinois Supreme Court had adopted the first two prongs of the "Miller Test" and did not also, by implication or otherwise, adopt the limitations of the examples of sexual conduct and lewd exhibitions given in Miller at 25:

> The Illinois court thus must have been aware of the need for specificity and of the Miller Court's examples. . . . The alternate reading of the decision would lead us to the untenable conclusion that the Illinois Supreme Court chose to create a fatal flaw in its statute by refusing to take cognizance of the specificity requirement set down in Miller.

The District Court discussed the Ward decision but found it inapplicable to the power of the Ohio courts to similarly construe our statute. Sovereign News, supra, 448 F. Supp., at 400, n.346. In Sovereign News, supra, 448 F.Supp., at 406, n.361, the District

Court said that it was not the case as to Sovereign News Company that it could take notice from prior Ohio convictions. However, there were hundreds of convictions for obscenity in Cleveland from 1973-77 which gave notice to Sovereign as well as numerous past decisions in Ohio. See for example: Cincinnati v. Walton, 76 Ohio Law Abs. 612, 3 Ohio Ops.2d 252, 145 N.E.2d 407, 412 (Cincinnati Muni. Ct. 1957); State v. Lerner, supra (Hamilton County Appeal, 1948); Jacobellis v. Ohio, 378 U.S. 183 (1964); Youngstown v. DeLoreto, 19 Ohio App.2d 267, 48 Ohio Ops.2d 393, 251 N.E.2d 491 (Mahoning County, 1969); Moody v. Thrust Corp., 35 Ohio Misc. 84, 93, 62 Ohio Ops.2d 115, 291 N.E.2d 922 (Franklin County Common Pleas, 1972); State v. Valchar, 34 Ohio App.2d 21, 63 Ohio Ops.2d 52, 295 N.E.2d 137, Syllabus Two (Cuyahoga County, 1973); State, ex rel.

Keating v. Film Entitled "Vixen", supra; State, ex rel. Sensenbrenner v. Adult Books Store, supra; Hollington v. Ricco, supra; State, v. ex rel. Ewing v. "Without a Stitch", supra; State v. Dalene Burgun, supra.

The Ohio Supreme Court did recognize the Ward decision and proceeded to similarly construe R.C. 2907.01(F) to comply with Miller, in Ronald Burgun, supra, 56 Ohio St.2d, at 361, 384 N.E.2d, at 260-61:

> The United States Supreme Court pointed out that subsequent to the Miller decision, the Illinois Supreme Court decisions had proceeded to "construe" Section 11-20 of their Criminal Code to incorporate the guidelines in that decision. Id., at page 774-775. As a result of that state Supreme Court's "response to Miller," the Court indicated, at page 776, that it would not hold the Illinois statute to be "unconstitutionally overbroad."
>
> This court, as previously noted in Vixen and

> Sensenbrenner, supra, [35 Ohio St.2d 215 (1973) and 35 Ohio St.2d 220 (1973)] has followed a somewhat similar "response to Miller" in its construction of R.C. 2907.34. Today, that "response" continues with a further clarification by the interpretation and application of its successor, R.C. 2907.01(F).
>
> We hold that R.C. 2907.01(F) is neither unconstitutionally overbroad nor void for vagueness when it is read in pari material with the Miller decision. The Miller test for defining obscenity is therefore incorporated into that statute by an "authoritative" state court construction specifically sanctioned by Miller. . . .

It must also be remembered that this Court's examples, given at page 25 of Miller, were not stated to be the limit of state regulation of conduct which can form the basis for obscenity under the three-part "test". The Miller decision stated, in this regard, at page 25:

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their

> concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra: [Emphasis added.]
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

It is clear that the Ohio Supreme Court meant to and did construe R.C. 2907.01(F) in such a manner to incorporate the three-part "Miller Test" as well as the general scope of the examples of sexual conduct, as had Illinois, in order to comply with Miller v. California, and also Ward v. Illinois, supra. The Ohio Court's action on these issues conclusively shows that the law has been accorded that which Sovereign

News sought from the federal courts, namely, a constitutional standard for judging obscenity in Ohio.

This effort of the Ohio Supreme Court was recognized by the court of Appeals below in upholding the statute as construed and as intended and a constitutional test for obscenity has been used in this manner since 1973, even before the Ohio Supreme Court ruled.

The Ohio definition of R.C. 2907.01(F) must be tested by the federal courts as if it had been originally drafted in the words of the Miller decision, as the Ohio Supreme Court so held. See also: P.A.B., Inc. v. Stack, 440 F.Supp. 937, at 943 (S.D. Fla. 1977).

It is no answer that the Ohio Supreme Court did not adopt the examples of Miller, supra at 25, since those examples are not the limit of conduct subject to obscenity and the Ohio

decisions have long confined the reach of prosecution to sexual conduct, not mere nudity and not pure violence, and no conflict with the First Amendment will ever be approved by the Ohio Supreme Court. If anything, the Ohio statute is more precise than the "examples" given in Miller, supra at 25. The scope of the examples were clearly adopted by the Ohio Supreme Court and no defect exists for this reason in the present Ohio law.

Finally, it cannot be fairly said that the District Court and Court of Appeals judges were sharply divided with respect to the validity of the Ohio statute. In the Court of Appeals, the Sovereign News opinion on February 4, 1982, was unanimous by the three judges. In the habeas case, Turoso, et al., there was one dissenting judge. Only one judge was common to both panels, so there were four judges upholding the statute with

one judge disagreeing. In the District Court, there were two judges, Judge Manos and Judge Aldrich who ruled the statute invalid and granted habeas relief and two judges who upheld the statute and denied relief, Chief Judge Battisti and Senior Judge Thomas. The prior decisions of federal courts have also ruled in favor of the Ohio statute. See: Grove Press v. Flask, 326 F.Supp. 574, 578-80 (N.D. Ohio E.D. 1970), and New American Library v. Allen, 114 F.Supp. 823, 830-31 (N.D. Ohio E.D. 1953). See also: Huffman v. Pursue, Ltd., 420 U.S. 592, 596 n.4 (1975), and Art Theatre Guild v. Ewing, 421 U.S. 923 (1975) (affirming State, ex rel. Ewing v. "Without A Stitch", 37 Ohio St.2d 92 (1974).

The Miller standards were the law in Ohio at the time the District Court held the hearing on the preliminary injunction and declaratory judgment and were the law

at the time the District Court announced its decision seven months later. This remains the law today in Ohio and this Court should approve of and affirm the decisions of the Court of Appeals and the Ohio Supreme Court on these statutory construction issues.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that substantial justice was accorded on these statutory issues as to all constitutional claims and the writ of certiorari should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari were properly mailed to each of the following counsel on July 24, 1982.

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